IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

NORMA R. BROIN, et al.,
Plaintiffs,
vs. CASE NO. 91-49738
CA 22

PHILIP MORRIS COMPANIES,
INC., et al.,
Defendants.
_____/

TRIAL
VOLUME 73

TRANSCRIPT OF PROCEEDINGS in the above-styled cause before the Honorable Robert Paul Kaye, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Wednesday, August 6, 1997, at 1:30 p.m.

APPEARANCES:

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SUSAN ROSENBLATT, ESQ.
On behalf of the Plaintiffs
HUGH R. WHITING, ESQ.
JONES DAY REAVIS & POGUE
On behalf of R.J. Reynolds

TAYLOR, JONOVIC & WHITE

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On behalf of Liggett and Brooke Groups
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On behalf of Brown & Williamson and American
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JOSEPH R. MOODHE, ESQ.
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On behalf of The Council for Tobacco Research
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MR. WHITING: We have a preliminary matter with respect to the next witness.

THE COURT: All right. Is it a live witness?

MR. ROSENBLATT: Yes, Judge. We have two live witnesses, but the first one is Dr. Carr.

THE COURT: Do you want to step out for just a minute, please? All right.

(The witness exits the courtroom.)

MR. WHITING: Judge, I've gone carefully through this witness' deposition that he gave in I believe it's April of this year. As far as I can tell, there's nothing that this witness can say on any issue that's, first of all, not cumulative, and second of all, that he's qualified either to give an opinion on or that he has personal knowledge of, and I have particular concern because in his deposition, he purported to relate a third-hand hearsay incident with respect to Dr. Wender, and I don't want to have that be in front of the jury because he--well, for obvious reasons, but I think we ought to have some clarification on what the subject matter would be of this witness' testimony because, as I say, I've read the deposition and it's either cumulative, not a

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subject matter appropriate for expert opinion, or he has no personal knowledge.

THE COURT: This is doctor who?

MR. ROSENBLATT: David Carr, C-A-R-R.

THE COURT: And his specialty is?

MR. ROSENBLATT: He's a cancer specialist. He's an oncologist.

THE COURT: Oncologist.

MR. ROSENBLATT: He is board-certified in internal medicine, but he spent his life at the M.D. Anderson Cancer Center in Houston, Texas, and for about a quarter of a century, all he did was treat cancer patients.

THE COURT: He's an oncologist?

MR. ROSENBLATT: Correct.

THE COURT: Is he going to talk about what, the mechanism of cancer?

MR. ROSENBLATT: To a certain extent.

MS. ROSENBLATT: He is. Lung cancer, the mechanism of cancer, yes. He will address that directly. He's going to discuss also his personal involvement over the years, you know, that--he's 83 years old. He's had a long career in treating this. He got involved not in the public sector, but privately, and interested in cancer in the 1950s and

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1960s and '70s, and that's basically the nature of his testimony. It won't be cumulative and it's from a different perspective of treating cancer patients.

THE COURT: What makes him qualified, to do what?

MR. RUSS: What troubles me in particular is if he's going to give opinions based on--as I read his deposition, he says--we asked him whether or not he can testify about specific instances of suppression and fraud and distortion on the part of the industry, and he says, I quote from Page 127 of his deposition: "I can simply tell you that I've read information indicating to me that's what had happened, and I can quote, there's a book, Ashes to Ashes, purporting to be a history," because we asked him if he had a basis of knowing that, and he said, "I didn't know it."

MS. ROSENBLATT: He's not going to go into that.

THE COURT: She indicated that he was not going to go into that.

MS. ROSENBLATT: He's not going to get into it. Let's just take it as it comes. We told him about that. He has his own personal experiences over the years. Not every question was asked of

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him, you know, in this deposition.
MR. RUSS: Let me ask about this one particular thing. He relates a third-hand hearsay incident about Wender and his employment.
MS. ROSENBLATT: No.
MR. RUSS: That's out?
MS. ROSENBLATT: Unless you bring that up in some way through your questioning.
MR. RUSS: Okay. That's interesting. Fine.
MR. ROSENBLATT: Well---
MR. RUSS: Let's see what happens.
MR. ROSENBLATT: Obviously, there are developments. You had a pattern of rulings. If I intended to ask about The Cigarette Papers and have him base his opinions in view of your rulings--he's not doing that, and the same thing with Ashes to Ashes.
MS. ROSENBLATT: It would be very foolish on our part.
MR. ROSENBLATT: Yes. You made it clear what your attitude is toward those wonderful books.
THE COURT: My attitude toward those wonderful books has absolutely nothing to do with

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anything because I haven't read them yet; so I wouldn't know what is interesting in the first place.

MR. ROSENBLATT: And I won't ask him about The Runaway Jury, either.

THE COURT: I read that one.

MR. ROSENBLATT: It was very interesting, but---

THE COURT: A nice piece of fiction, but purely fiction.

Okay. Let's go ahead and proceed. Do what we can do.

Did you get all those distributed?

THE BAILIFF: No, Judge.

THE COURT: Not yet.

THE BAILIFF: It will be a few seconds.

(The jury entered the courtroom and the following proceedings were had:)

THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.

THE COURT: Have a seat, folks. Members of the jury, do me a favor, in the upper left-hand corner of your notebook, just write your seat number, okay? You're No. 1 in the corner there. Followed by No. 2, No. 3, 4, 5, 6.

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THE CLERK: They already have it.
THE COURT: They have those already?
THE CLERK: Yes.
THE COURT: Why was there such confusion to put everything in the right place? Put it in the front. You're 7, 8, 9, 10, 11, 12, 13. Okay. Now, there won't be any more confusion. Okay. Proceed.
MR. ROSENBLATT: Dr. David Carr.
THE COURT: Have a seat there, sir.
THE WITNESS: Thank you.
THE COURT: There is a microphone there with the red light on.
THE WITNESS: Thank you.
THE COURT: If you move your chair a little closer. Okay. Talk up loud and clear and everyone will hear you.
THE WITNESS: Yes, sir.
THE COURT: Okay.
Thereupon:

DAVID T. CARR

Having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBLATT:

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Q. Hi, Dr. Carr. Tell the jury, please, your full name and your present address.
A. My full name is Dr. David Turner Carr. I live at [DELETED]

Q. You are a medical doctor; is that correct?
A. Yes, sir.
Q. And where did you get your MD degree and in what year?
A. I graduated from the Medical College of Virginia in Richmond, Virginia in 1937.
Q. Now, I know you had a long association with M.D. Anderson Cancer Center in Houston, Texas. Tell us about that, what you were involved in, and also the fact that you were a professor of medicine at the University of Texas?
A. When I retired from the Mayo Clinic in Rochester, Minnesota, in 1939, I went to the M.D. Anderson Cancer Center in Houston, Texas to help start a comprehensive program in the care of patients with lung cancer.
Q. Excuse me, Dr. Carr. I think you misspoke. You said you went to M.D. Anderson Cancer Center in 1939.
A. Oh, I meant 1979. Excuse me.

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Q. All right. Okay. Continue, please.
A. I went there to start a comprehensive program in the care of patients with lung cancer because that had been my specialty at the Mayo Clinic for quite a few years.
Q. How big an institution is the M.D. Anderson Cancer Center?
A. It is one of the largest comprehensive cancer centers in the world. We had a 500-bed hospital. We had an outpatient clinic to take care of ambulatory patients. We had about five or six hundred doctors who were either taking care of patients, doing research work to learn more about the cancer problem.
Q. So let me back up a little because you said that after you had left the Mayo School of Medicine in Rochester, Minnesota, you then went to M.D. Anderson in Houston.
Tell us when you first went with Mayo.
A. I went to the Mayo Clinic as a Fellow to learn more about medicine in 1943, and in 1947 I became a permanent member of the staff of that institution and stayed there then from 1943 until 1979 when I retired from that institution.
Q. Okay. So basically, is it fair to say that

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in terms of your medical career, you spent about 36 years at Mayo, you left Mayo, you went to M.D. Anderson in Houston, and you spent, what, about 14 or 15 years there?

A. I was there, I believe, for 13 years. I retired from that institution in 1992.

Q. So that as a practical matter, in terms of an overview of your medical career, those are the two institutions that you've been affiliated with, Mayo and M.D. Anderson.

A. They were the primary institutions, yes, sir.

Q. What does oncology mean?

A. It means the study of cancer.

Q. And let's talk about Mayo first, and I would like for you to give the jury an idea as to what your hands-on responsibilities were over the years, and obviously, I'm talking big picture, because I don't expect you to go year by year for that many years.

A. When I first became a permanent member of the staff of the Mayo Clinic, my primary interests was tuberculosis of the lungs. As that disease became less and less common in Minnesota, I saw the epidemic of lung cancer developing, and so I became

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very much concerned about taking care of patients with that disease, and so for the last 15 years that I was at Mayo, I spent a great deal of my time taking care of patients with lung cancer and studying that problem.

Q. What has been your relationship with the American Cancer Society over the years?

A. In 1935, I helped start the chapter of the American Cancer Society in Rochester, Minnesota. I was very active in that organization, and in 1967 I was elected to be a member of the board of directors of the National Organization of the American Cancer Society. And I was a member of that board of directors until 1974 when I was rotated off of that board of directors because they did not want people to stay on the board for a long period of time.

I remained very active in the American Cancer Society in Minnesota and was president of that organization one of the years. Along about 1977 when I moved to Houston, I became active in the American Cancer Society in the Houston area and in the state of Texas, and was involved in that organization until I left Houston in 1992.

Q. Now, in looking at your curriculum vitae under the heading Committees, you were on the

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Commission on Cancer, American College of Surgeons, member representing American College of Physicians from 1976 through 1982.

Tell us about that, please.

A. The Commission on Cancer is to some extent sponsored by the American College of Surgeons, but it has representatives from a wide variety of national organizations concerned with cancer, and for the years mentioned, I was the representative from the American College of Physicians to that organization.

Q. You were the chairman of the American Joint Committee on Cancer from 1979 to 1982?

A. Yes, sir.

Q. And what did that particular organization involve itself with?

A. Cancer is a very complicated problem, and it is very important to know the extent of the cancer, whether it is just a little bit or whether it's a big one, whether it is confined to the organ where it starts or whether it has spread to other parts such as lymph nodes or other parts of the body, like brains, bones, liver and so on.

The American Joint Committee on Cancer was a national organization established to set up

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standards of classifying cancer by what we call the stage of the cancer.

For example, a Stage I cancer is one that is just a little cancer confined to the organ where it started. A Stage IV is the other end of the spectrum and is a cancer that has spread to many other parts of the body.

I was involved in that organization beginning in 1964, and I remained active in it up until, oh, along about 1990 or '92, and during the years mentioned, I was the chairman of that organization.

Q. And, Dr. Carr, you've been a past vice president of the American Thoracic Society.

Tell us what that organization is.

A. Yes. The American Thoracic Society is the medical part of the American Lung Association, and it is an organization of physicians and other health professionals strongly interested in the lung and diseases of the lung. I was active in that organization for many, many years and was vice president as mentioned.

Q. And you've been president of the International Association for the Study of Lung Cancer?

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A. Yes, sir. Along about 1972 a group of us met together to talk about the epidemic of lung cancer. It was a successful gathering, and several of us said we ought to have an organization to do this on a regular basis. So, in 1973, we organized the International Association for the Study of Lung Cancer. I was active in that organization for many years serving at one time as its president.

Q. In what field of medicine are you board-certified? The jury is familiar with the concept of what it takes to become board-certified in a given specialty.

A. I was board-certified in internal medicine and in the subspecialty of pulmonary diseases.

Q. Pulmonary, of course, would include the lungs?

A. Yes, sir.

Q. Now, Dr. Carr, broadly speaking, when did you become interested in the overall subject of smoking and health?

A. I became interested beginning in 1950 when there were papers in the medical literature indicating very strongly that the epidemic of lung cancer might be related to cigarette smoking.

Through the 1950s, I became more and more

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interested in that possibility, because as a physician taking care of patients with lung disease, I had more and more patients who had lung cancer rather than other lung diseases such as tuberculosis.

In 1960 I became sufficiently concerned about this that I actually wrote and published a paper concerned with the relationship, the evidence as I interpreted it from careful study, that the epidemic of lung cancer was due to cigarette smoking.

Q. Now, you said you wrote that article in 1960. Were you convinced as a physician in 1960 that cigarette smoking did, in fact, cause lung cancer?

A. By 1960 I was completely convinced of it, and I had already begun to be very much involved in an effort first to persuade all of my patients to quit smoking, and to go to the public in general and try to persuade them to quit smoking.

Q. Dr. Carr, I want you to assume that the CEOs of Philip Morris, R.J. Reynolds, Lorillard and Brown & Williamson have testified, or will testify in this case, in April, 1997 that it has not been scientifically proven that cigarette smoking causes

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cancer.

Now, with that assumption, my question to you is, is there any basis in science or medicine for taking that position?

A. There is none whatsoever. I know of nothing in the field of medicine that has ever been studied so extensively and so intensively as this relationship between smoking and lung cancer.

Literally millions and millions of people have been asked if they are smoking, and then they have been followed up year after year after year to find out if they are still alive and well, or if they have died and what they have died of.

And there are hundreds and hundreds of very good scientific publications showing overwhelmingly that the epidemic of lung cancer is due to cigarette smoking.

Q. What do we know, Dr. Carr, about the mechanism, the details of how that occurs, the act of smoking cigarettes for a number of years leading to lung cancer and what it does to the cells?

A. There is a great deal of evidence about that. There have been many studies showing the changes in the lining of the bronchial tubes in smokers showing how the lining is damaged early on

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so that it undergoes changes and gradually becomes more and more abnormal until there is, in many of the individuals who have been smoking, the beginning of lung cancer, the bare beginning or the surface, on that lining of the bronchial tube, and then, of course, progressing into bigger and bigger masses of cancer cells until it becomes a full-blown cancer.

Q. And, Dr. Carr, based upon reasonable medical probability, what other forms of cancer other than lung cancer does cigarette smoking cause?

A. The medical literature contains lots of evidence that smokers have a great deal more problems with cancer of the larynx, cancer of the esophagus, cancer of the stomach, cancer of the pancreas, cancer of the bladder, and even in women, cancer of the cervix.

Q. Do you have an opinion, based upon reasonable medical probability, as to whether the diseases that are caused by active smoking are also caused by secondhand smoke?

A. I don't have any doubt about that, because secondhand smoke contains all of the chemicals that we know can cause cancer, and there is no reason to doubt that anyone breathing enough secondhand smoke would have the same effect as the individuals having

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what we call mainstream smoke.
Q. Now, Dr. Carr, I believe you had occasion, when you were at Mayo, to testify before the Minnesota legislature in 1975 on an issue relating to secondhand smoke; is that correct?
A. Yes, sir.
Q. And what was the purpose of the testimony? What was the purpose of legislation you supported?
A. In the 1970s, many of us became concerned about the harm that secondhand smoke was doing to people in the work place and in other public places. We went to the legislature, the state of Minnesota, and presented the evidence that secondhand smoke was indeed a public problem, and we convinced the Minnesota legislature to pass legislation controlling the exposure of nonsmokers to secondhand smoke by regulating smoke in the working place and arranging for restaurants to have segregation so that nonsmokers could be free of secondhand smoke if they were having a meal in a restaurant.
Q. And that occurred in 1975?
A. Yes, sir.
Q. Now, have you had occasion, in your capacity as a cancer specialist, a specialist in oncology, to debate members of the Tobacco Institute in public

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forums about the health consequences of smoking?
A. Yes, sir.
Q. And who have you debated?
A. I have debated a man named Mr. Walker Merriman.
Q. What was his affiliation with the Tobacco Institute, do you know?
A. I believe he was related to the Tobacco Research Institute or an organization that had approximately that name.
Q. During what period of time did you engage in debates with Mr. Merriman?
A. During the 1980s.
Q. And without going into a lot of detail with respect to the issue of whether cigarette smoking caused lung cancer and other diseases, what was the position of the Tobacco Institute as expressed by Mr. Merriman in these debates?
A. Mr. Merriman would insist that the relationship between cigarette smoking and lung cancer had not been proven to his satisfaction. He attempted to assure the listening public that there was still doubt about it and that they could continue to smoke and not listen to me and other speakers who were telling them that there was a

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definite danger to cigarette smoking.
Q. Dr. Carr, prior to today, have you ever testified in a courtroom before?
A. Not in the tobacco problems, sir.
Q. How old are you?
A. 83 years old.
Q. Okay. And so this is the first for you, testifying in a courtroom in a tobacco case in front of a jury?
A. Yes.
MR. ROSENBLATT: Thank you, sir.
THE COURT: Cross?
MR. RUSS: Yes, sir.
CROSS EXAMINATION
BY MR. RUSS:
Q. Good afternoon, Doctor. My name is Mike Russ. I represent Brown & Williamson and I have a few questions for you.
You retired I think in 1992; is that correct?
A. Yes, sir.
Q. And since you've retired, is it correct to say that the only medically-related work you've done is to be a consultant for plaintiffs' lawyers suing tobacco companies?

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A. No. That is not true. I have assisted lawyers in other medical/legal problems.
Q. Most of your work, though, Doctor, has been in serving as an assistant for plaintiffs' lawyers in suing tobacco companies, hasn't it?
A. No. I have done more work with lawyers in other medical/legal problems than in this issue of tobacco.
Q. But you haven't done any work since 1992 involving medicine other than serving as a consultants for plaintiffs' lawyers; is that correct?
A. No. Some of my work has been serving for defense attorneys.
Q. All right, sir.
Have you done any work since 1992 medically related, other than serving as a consultant for lawyers involving lawsuits?
A. That is correct, sir.
Q. That's the only work you've done since that time?
A. That's the only work that I have been done. I have not been taking care of sick people.
Q. And in connection with that work, your hourly rate is what, Doctor?

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A. At the present time my rate is $300 an hour for research work and $450 an hour for testifying in court, whenever that happens to come to pass.

Q. All right, sir. And in connection specifically with the issue we are dealing with in this case, secondhand smoke or environmental tobacco smoke, have you ever personally done any original research in that area?

A. No, sir.

Q. Have you ever published any papers, any medical papers, on the health effects of secondhand smoke?

A. No, sir.

Q. Have you actually read, sir, all of the 1964 Surgeon General's Report?

A. I have not read it word for word, but I have studied it on many occasions.

Q. All right, sir. And is that also true with respect to the 1992 EPA Report; you have not read that report in full either, have you?

A. That is correct.

Q. Okay, sir. Now, I want to ask you about particularly the work you've done with respect to flight attendants.

MR. ROSENBLATT: Excuse me, Your Honor.

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Way outside the scope of direct, obviously.

THE COURT: Yes. I think it is. I'm not sure where you're going with that. It's not in direct.

MR. RUSS: Let me phrase it this way, Judge.

Q. You've done no work or scientific studies with respect to the medical effects of environmental tobacco smoke or secondhand smoke on flight attendants?

MR. ROSENBLATT: Objection. Outside the scope.

THE COURT: Overruled.

Q. You have no knowledge of the incidence of lung cancer in flight attendants, do you?

A. No, sir.

Q. Your specialty has been lung cancer; is that correct?

A. I have had a very special interest in lung cancer, but I was an internist and a physician primarily concerned with lung disease for years before I became aware of the epidemic of lung cancer and began to spend so much of my time taking care of the unfortunate people with that disease.

Q. Well, let's talk about lung cancer for a

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moment. There are a number of what are called risk factors with respect to lung cancer, are there not?
A. Yes, sir.
Q. For example, is it correct that the family history of lung cancer is a risk factor for lung cancer?
A. Yes, but by that I mean that a person who has a strong family history of lung cancer may be more susceptible to the chemicals that cause lung cancer.
Q. Okay, sir. And dietary factors, those are also risk factors for lung cancer; is that correct?
A. Yes, sir.
Q. Radiation exposure, that's a risk factor for lung cancer, is it not?
A. Radiation exposure of certain kinds is a very important cause of lung cancer. For example, the uranium miners of Colorado have a substantial risk of getting lung cancer whether they smoke or not.
Q. Ionizing radiation is the kind of radiation that has a potential to affect the tissues and cause cancer; is that correct?
A. I believe that is correct, sir.
Q. Arsenic is a risk factor for lung cancer?

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A. Yes, sir.
Q. Iron oxide is a risk factor?
A. Yes.
Q. Chloro-cloromethyl ether is a risk factor, is that correct?
A. Yes, sir.
Q. Now, with respect to all of these risk factors, excepting for example family history, these other outside risk factors, is it correct that the question of the amount of the dose of some of these chemicals or radiation strongly affects the level of the risk?
A. Yes. I want to clarify one thing, though. There's no evidence that diet by itself has any causal effect on patients getting lung cancer. It is those people who have the improper diet who are more susceptible to the chemicals that may cause lung cancer.
Q. Well, let's take, for example, arsenic or iron oxide or chloro-chloromethyl. The level of the dose that one receives of those particular agents affects directly the level of the risk; is that correct?
A. Yes, sir. I think it's true that almost all poisons have a dose response relationship. In other

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words, a little bit of poison is nowhere near as harmful as a whole lot of the same poison.

Q. And that's where we get this phrase, the poison is in the dose; is that correct?

A. Well, I've not heard that before, but that seems reasonable.

Q. You would agree that that's a reasonable proposition based on your knowledge of the medicine, right?

A. Yes, sir.

Q. Okay. And that same proposition applies to secondhand smoke; doesn't it?

A. I think it applies to everything, sir.

Q. Let me ask you this question, Doctor: With respect to primary cigarette smoking, wouldn't it be your opinion that smoking just one cigarette a day would not increase your risk of lung cancer in any measurable way?

MR. ROSENBLATT: Judge, outside the scope of my direct.

MR. RUSS: It's directly on the issue of smoking.

THE COURT: Let's not argue.

MR. RUSS: I was speaking to you.

(Counsel and the court reporter

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approached the bench, and the following discussion was held outside the hearing of the jury:)

MS. ROSENBLATT: Our objection is this witness' testimony was very brief and very focused. We didn't want it to be cumulative. We didn't get into any causation of secondhand smoke. We needed him to go through the areas that had not been fully covered by other experts.

One was the particular diseases caused from active smoking that would also be caused from secondhand smoke and the names of those diseases, which he did, his experience with lung cancer, is there any question about lung cancer, and going through that.

In terms of how much people smoke and the whole--this is absolutely not anything that we got into with him, discussed with him, and he was just very--you know, they are arguing cumulative all the time. We had many witnesses on that. We didn't ask a question and I don't think it was in the scope of what he was asked.

MR. RUSS: Judge, the witness on direct examination-- unless my ears failed me.

MR. ROSENBLATT: Which could be.

MR. RUSS: It's possible. It's

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happened before.

--gave testimony on causation with respect to a whole range of things, different cancers. He also has given testimony with respect to exposure levels--not on direct, but he plainly says that the poison is in the dose.

THE COURT: That's not what he testified. I'm talking about what he said on direct.

Now, my understanding is he did not go into a specific causation. He did not quantify the question of cancer vis-a-vis cigarettes. He just said that smoking causes cancer in one, two, three, four, five, six areas. And he also said that ETS causes it. He didn't get into quantifying. You're getting into it.

MR. RUSS: Yes, but, Judge, we are entitled to show that the causation testimony he gave is dependent upon the level of exposure. That's true with respect to primary; that's true with respect to secondhand smoke. If his testimony is what he testified to in his deposition, one cigarette will not show any increase in cancer, that's directly relevant to whether his causation opinion is of any relevance at all in this case.

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THE COURT: First of all, an increase in cancer presupposes that there is a cancer.

MR. RUSS: No.

THE COURT: That's what the question seems to indicate. The question now is if the elements of one cigarette as compared to the elements in no cigarettes is going to be at least a risk factor in getting cancer, and then he's going to say the elements of a cigarette are carcinogenic.

MR. RUSS: No. He's going to say, if he's consistent with his deposition, smoking one cigarette a day is not going to show any elevated risk with lung cancer. If he's consistent with his deposition, that's exactly what he's going to say.

THE COURT: Elevate?

MR. RUSS: Elevate from not smoking.

THE COURT: Okay. Now, that's still quantifying it.

MR. HARDY: Your Honor, let me just add. I would think any time a witness says cigarette smoking causes lung cancer, that on cross examination, it's fair game to say, how much? I mean, that's what is happening here. The man is giving a causation opinion. Mr. Russ is exploring the basis of the opinion and he's exploring how much

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causes cancer. It's directly relevant to his bottom line opinion.

MR. RUSS: Right.

MR. FURR: Not only that, the opinion expressed with respect to secondhand smoke or tobacco smoke was dependent on his opinion with respect to active smoking. He said, "I believe that secondhand smoke will cause the diseases that mainstream smoke causes."

We are entitled to determine what amounts of mainstream smoke it is that causes that disease so we can compare that to the exposure to secondhand smoke. It goes directly to the credibility of his testimony.

MR. RUSS: If he weren't able--if he wasn't linking primary smoking to secondhand smoke, there would be no relevance to his primary causation.

THE COURT: If you're going to open the door to that, then I'm going to let them go back to redirect and get into the whole area of mechanisms and all of that sort of business regarding cancer and smoking.

MR. RUSS: They've already done it.

MR. HARDY: They got into mechanism.

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THE COURT: No, they haven't.
MR. RUSS: They asked him about exchanging in tissue.
THE COURT: You're talking about not quantifying it.
MR. ROSENBLATT: I didn't ask one quantifying question.
MS. ROSENBLATT: We asked questions based upon medical research, his years with the institutions, whether it was an issue, his debating. We didn't get into quantifying amounts. We didn't get into any of that. That's been re-covered and re-covered by many, many witnesses.
THE COURT: What are you going to do with this issue about one cigarette won't increase the risk? What is next? What follows up next, so we don't have to come back and forth here?
MR. HARDY: Find out what level he thinks is a sufficient dose.
MR. RUSS: He's going to say--my next follow-up question is going to be, "You don't know the level in which environmental tobacco smoke or secondhand smoke creates a risk of lung cancer, do you?" And he's going to say, "No, I don't."
THE COURT: Okay.

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MS. ROSENBLATT: He didn't testify--we didn't have him testify--I know that's his opinion, but he did not testify that exposure to secondhand smoke causes lung cancer. We never even asked him that.

MR. FURR: Of course he did.

THE COURT: Overruled.

(The following proceedings were held within the hearing of the jury:)

Q. (By Mr. Russ) Doctor, isn't it true that you've expressed the opinion that smoking as little as one cigarette a day would not result in any measurable increase for lung cancer?

A. I don't know that I've ever said that, but it is my opinion that we do not know of a safe level of smoking.

Q. Well, with respect to that issue, though, isn't it true that you have testified that smoking as little as one cigarette a day would not result in a measurable increase in the risk of lung cancer?

A. I don't remember that, sir.

Q. All right. Let me show you the deposition. This is the deposition that you gave in this case on April 4. I'll give you a copy of it.

A. Yes, sir.

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THE COURT: What page are you on, sir?
MR. RUSS: Page 149, Line 11, Doctor.
MR. ROSENBLATT: No, Mike. Give him the bigger one.
MR. RUSS: You want the mini-script?
MR. ROSENBLATT: Give the doctor this. I'll give him the bigger print.
MR. RUSS: You want the doctor to see this one?
MS. ROSENBLATT: The print is larger.

Q. Okay. Sorry. Here you are, Doctor.

THE COURT: 149.
MR. RUSS: Yes, sir.
THE COURT: Line 11.

Q. Line 11. Now, if these transcripts are coordinated, Doctor, you should have the following question and answer.

And my question to you is--did you, in your deposition--were you asked this question and did you give this answer:

"Doctor, would you expect an epidemiologic study to be able to identify an increased risk of lung cancer in persons who smoke one cigarette per day, year after year?"

And your answer was: "I doubt that the

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impact of one cigarette per day would be provable. The impact would probably be small enough that it would be hard to get statistical proof of the harm of one cigarette per day."

Did you give that testimony?

A. Yes, sir.

Q. And is that your opinion?

A. May I elaborate on that?

Q. Yes, sir. If you would just answer if that's your opinion, then you can certainly explain your answer.

A. That is what I said, and I would like to elaborate by pointing out that it would take millions and millions of individuals being surveyed who would agree to smoke only one cigarette per day for the next ten years and be followed over that period of time to determine if there was any harm from that dose.

I did not say that it was my opinion that it was harmless. I simply said we don't know because that kind of an epidemiological study would be impossible to carry out.

Q. Doctor, is it true that you don't know what the exposure level is for secondhand smoke that causes a risk?

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A. I don't know for sure; that is correct, sir.
Q. Doctor, I believe you testified on direct examination, with respect to the other cancer that you believed could be associated with environmental tobacco smoke. Do you recall you gave such testimony? Did you testify with respect to environmental tobacco smoke and the other cancer other than lung cancer?
A. No. I believe that I was testifying about smokers getting other forms of cancer.
Q. Okay. So you don't have any basis for testifying that any cancer other than lung cancer is caused by secondhand smoke, do you?
A. It is my opinion, based on my care of patients and my study of the medical literature, that smoke is harmful, whether it is direct smoke or secondhand smoke, and that smoke has chemicals in it that will cause a variety of cancers, as well as lung cancer.
Q. Doctor, with respect to cancers other than lung cancer, is it your opinion that there has been no other cancer that has been adequately proven to be related to ETS other than lung cancer; is that your opinion?
A. I don't know of any study that would answer

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that question. It may or may not. We simply do not know.

Q. Let me refer you to your deposition, Doctor, at Page 61 and Line 18 through 23, I believe it is.

Were you asked this question and did you give this answer:

"What other cancers are you prepared to address, other than lung cancer?"

And your answer was: "At this time, I don't believe any other cancer has been adequately proven to be related to ETS. We don't have enough data to answer that question."

Do you recall being asked that question and giving that answer?

A. Yes, sir.

Q. Was that your testimony and is that your testimony today?

A. If I may elaborate on it, sir.

Q. Yes, you can, if you would answer.

A. Yes, the answer is yes, that is what the deposition shows, and I would emphasize we don't have enough data to answer that question. We simply don't know with absolute certainty.

Q. With respect to adult respiratory diseases and environmental tobacco smoke or secondhand smoke,

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the answer would be the same, wouldn't it; that it has not been proven that secondhand smoke causes adult respiratory diseases?

A. I think we have every reason to extrapolate from the evidence that mainstream smoke causes respiratory disease to believe that secondhand smoke would do the same thing.

Q. Let me refer you to Page 62 of your deposition, Doctor, and refer you to Lines 10 through 21.

MR. ROSENBLATT: Could you start on Line 24, Page 61 to put it in context?

MR. RUSS: Sure.

Q. Doctor, take a look at Page 61, Line 24. You were asked this question: "Thank you, Doctor. You also said that you might be prepared to address ETS exposure in nonsmokers and the respiratory system?

"Answer: There is very good evidence that children, babies and children, who are exposed to ETS, have an increase in disease of the respiratory system. I'm not a pediatrician, so I have not taken care of them but I think the literature is convincing."

"With respect to children?" And then you

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answer, "Yes."
"Are you prepared to address ETS exposure in nonsmoking adults in respiratory disease?"
"Answer: I don't believe there is any convincing evidence of that, other than exacerbation of preexisting problems. I believe there is evidence that asthmatics, who are exposed to substantial ETS, may have spells of asthma precipitated by exposure to the irritants of ETS."
"Do you have an opinion as to whether ETS exposure in nonsmokers can actually initiate the underlying disease process of asthma?"
"Answer: I doubt that."
Okay, sir. Is that your testimony on deposition?
A. Yes, sir.
Q. Is that your testimony today?
A. I agree with that.
Q. So you don't believe that secondhand smoke is an initiating mechanism for asthma; is that correct?
A. Yes, sir.
Q. With respect to heart disease, Doctor---
MR. ROSENBLATT: Objection, Your Honor. There was not a question about heart disease on

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direct. This is way beyond the scope.
THE COURT: Yes, I think that is. The answer, as I recall, did not include heart disease.
MR. RUSS: All right, sir.
Q. Doctor, with respect to the risks of smoking that you testified to, isn't it true that the risk of cardiovascular disease goes down to that of a never-smoker?
MR. ROSENBLATT: Objection, Your Honor. This is cardiovascular disease.
THE COURT: Finish the question.
MR. RUSS: I'll strike that. That is a heart-related issue.
Q. Let me get to lung cancer.
Isn't it true, Doctor, that the risk of lung cancer for one that stops smoking goes down to that of a never-smoker after 10, 15 or 20 years?
A. No, sir.
Q. Let me refer you to Page 140 of your deposition. Actually, start at Page 139, Doctor, Line 24.
"And what are the consequences of stopping smoking?"
"Answer: Tremendous benefit. When an individual quits smoking, the risk of cardiovascular

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disease goes down"---
MR. ROSENBLATT: Your Honor, here we are again on cardiovascular disease. It's just another way---
MR. RUSS: Do you want to strike that part of it? It goes on as far as the rest of the answer.
THE COURT: Get to the part where you're talking about.
Q. Okay. "The problem of chronic obstructive pulmonary disease is helped. The risk of lung cancer goes down tremendously, so that instead of having a huge risk of getting lung cancer, the risk goes down approaching the risk of the never-smoker after 10, 15, 20 years."
Is that your testimony?
A. That is what I said, and the key word there is "approaching," but it never gets down to the level of the risk in a never-smoker. Even after 20 years the risk is at least double the risk in the never-smoker.
Q. And for someone that is not exposed as a mainstream smoker, the risk goes down by--the lung cancer goes down by half in five years; isn't that right?

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A. Approximately, yes, sir.
MR. RUSS: Thank you, Doctor.
THE COURT: Redirect?
MR. ROSENBLATT: Yes, Judge.

REDIRECT EXAMINATION

BY MR. ROSENBLATT:

Q. In terms of your actual hands-on practice of treating cancer patients and particularly lung cancer patients--because that was the focus of your practice, right?

A. Yes, sir.

Q. After you learned through X-ray, through examination, you made a diagnosis, the patient had lung cancer, what was the first question you asked in terms of history?

What would be the first question you would have asked a patient that you diagnosed with lung cancer in terms of obtaining a history, the very first question?

A. That might vary a great deal, sir, because once we had made the diagnosis, we would want to proceed to choices of treatment.

Q. Okay. What I'm getting at is, in terms of you trying to figure out what was the cause of that particular person's lung cancer, what question would

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you ask?
A. I imagine you're driving at the question of whether they were smokers.
Q. You got it.
A. That would have been a part of the general medical history when a patient comes in. One wants to know a great deal about that patient, including lifestyle, such as smoking habit.
Q. Dr. Carr, in terms of the thousands of lung cancer patients that you have treated in your career, and I did the figuring, you got your MD degree when you were age 23. You retired when you were 78. So that's 55 years of being an active practitioner.
And in terms of the thousands of lung cancer patients you treated, what percentage of them in your opinion approximately was caused by smoking?
A. At least 85 to 90 percent.
Q. What percentage of the lung cancers that you treated was caused by arsenic?
A. I don't remember ever seeing a patient who had lung cancer caused by arsenic.
Q. Did you ever have a lung cancer patient where you said to yourself that a particular food caused the lung cancer?

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A. I don't believe a food--any food causes lung cancer. An inadequate diet may increase a person's susceptibility to the carcinogenic chemicals that do cause cancer.

Q. Dr. Carr, although there may not be specific studies on all cancers caused from secondhand smoke, is it your opinion, based upon reasonable medical probability, that the same cancers caused by smoking are also caused by secondhand smoke?

A. Yes, sir.

Q. With respect to any patient that you saw in your over half a century as a hands-on treating physician specializing in cancer, with respect to any patient of yours who was a smoker, whether they had lung cancer or they didn't have lung cancer, whether they were sick or whether they were well, what was your recommendation with respect to their smoking?

A. In my early years as a doctor, I did not know that smoking was that harmful, so I did not get involved in the advising of patients not to smoke until in the 1950s.

From then on, I became a very strong advocate of cessation of smoking as a measure to improve patients' health and urged all of my

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patients to quit smoking if they were smokers or not to become smokers if they were not smoking.

MR. ROSENBLATT: Thank you, Dr. Carr.

THE COURT: All right. Doctor, you may step down. Thank you very much.

THE WITNESS: Thank you, Your Honor.

MR. ROSENBLATT: You're all done. Right through here. Thank you very much, Doctor.

THE COURT: What is next?

MR. ROSENBLATT: Our next witness, believe it or not, is Steven Carr, spelled the same way but no relation.

MR. MOSS: We have some motions, Your Honor.

THE COURT: I'll have to hear those motions, so if you'll just take a break.

(The jury exited the courtroom and the following proceedings were had:)

THE COURT: Folks, before we do that, I have got to address the jury in the jury room about a matter which has nothing to do with the case. It's the mechanical process I have to tell them something about.

(A brief recess was taken.)

(The following proceedings were had outside

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the presence of the jury:)

THE COURT: Okay. Have a seat. Now, what is the procedure?

MR. MOSS: With the next witness. I assume the next witness is not in the courtroom?

MR. ROSENBLATT: Right. I told him to leave.

MR. MOSS: All right. Judge, we had brought this up earlier relating to this particular witness, and counsel indicated and then the Court agreed that we ought not to take it up until right before the witness was here, and this is what we are doing. Earlier, the defendants filed a joint motion, I think it was on May 22, with regard to certain witnesses, and the Court indicated again we would take that up witness by witness.

This relates to plaintiffs' witness, Dr. Steven Carr. Obviously, we know what Dr. Carr is going to testify to because we have deposed him, and it's based upon that deposition that this motion is made, and the bottom line of this motion is that for a number of grounds, some of which and the most critical of which has already been addressed by this Court and ruled upon, this witness should not be allowed to testify in any case, let alone this case.

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THE COURT: Any case?
MR. MOSS: Yes, sir. I can't think of any.
THE COURT: What is he?
MR. ROSENBLATT: Ph.D. in communications.
MR. MOSS: He's a Ph.D. in communications, got his Ph.D. about three years ago. He wrote his dissertation on the subject of whether or not Hollywood was controlled by the Jews in the '40s and '50s. He's written another paper--he's published very little, but the papers he has published have no relevance to anything we are doing here. He wrote a paper on the Smothers Brothers and their firing from one of the networks.

But importantly, what they are trying to do with this witness, which is what I suggest is so improper in this case or any other case, is to make him a truth witness or a fraud witness.

His bottom line conclusion is that he has looked at certain select documents that were provided to him by two sources: one the night before his deposition by Mr. Rosenblatt.

The only documents that he got from Mr. Rosenblatt or Mr. Rosenblatt's office before the

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night before the deposition was a month or two before, he was sent a copy of The Cigarette Papers, which he says is a source--I think it's fair to say that it was his main source of information.

He also was given a series of documents, about the same stack, same size, four or five inches high, by another plaintiffs' law firm involved in some other tobacco litigation. He couldn't tell us, except generally, what it was that he was given because he didn't bring it to the deposition, and he couldn't remember what was in there except there were some ads.

In any event, that is the extent of what he has reviewed. It is important to understand or very critical to this analysis, Your Honor, that when asked what did he do, did you go out and make any type of a systematic--did you do any systematic research, did you do any meaningful research out there to find out what the public's perception was with regard to the issues that you're speaking of, Dr. Carr, after about eight or nine pages of him saying what do you mean by "the American public," going back and forth with the person taking the deposition, he finally said, "No, I didn't do any of that."

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When asked whether he did that or not--and the reason I suggest a systematic study needs to be done is that what the case law requires. You just can't make yourself an expert. If you rely upon a survey, then you've got to do the survey consistent with accepted practices and procedures, and at some point you probably can lay an appropriate predicate for a communication's expert to come in and say, "I've done this and that, and I am in a position to tell you based upon this work, which was done in accordance with accepted communications academic standards or whatever, that it's my opinion that the public's perception of blank blank was this."

In this case, there's not even a hint of that. He simply says, "I did not do any of that. I am not aware of what the public felt in the 1950s, in the '60s, in the '70s, the '80s or the '90s. The only thing I am aware of is that it is my opinion, from looking at these selected documents, which includes The Cigarette Papers, that the tobacco companies were engaged in a fraud and deceitful, systematic, deliberate, willful attempt to deceive the public."

Now, we got into that yesterday, if you remember, when a witness, Dr. Cummings, who had done

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a survey, by the way, and who had scientific background--which, by the way, this witness has none. He clearly says, "I have no scientific background with regard to medicine, causation, environmental tobacco smoke, injuries caused by direct smoking. I don't contend I have any. I haven't read the literature on that," so, you know, but he concludes that there was a fraudulent scheme entered into by tobacco companies by the manner in which they advertise, and the basis of it are these documents.

As I said, getting back to Dr. Cummings, when Dr. Cummings yesterday volunteered to the jury, if you remember, I think it was a question from the Court, totally unexpectedly said "Well, in my opinion, CTR's efforts and the CTR were a total fraud," we approached the bench, argued the matters to Your Honor, indicated that it was entirely inappropriate for any witness because there was no witness that can be a fraud or deceit or truth witness, and Your Honor granted the motion and instructed the jury to disregard the testimony, and Your Honor also indicated that that was an issue for the jury to decide, that was the ultimate issue.

Now, if I can, Your Honor, let me cite to

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you a couple of cases.

THE COURT: I would like to know a little bit more about him before you get into the cases.

MR. MOSS: All right, sir. I can do that.

THE COURT: Does his deposition indicate he has ever been a fraud investigator?

MR. MOSS: Absolutely not. Absolutely not.

THE COURT: The documents that he reviewed are what kinds of documents?

MR. MOSS: Well, here we have the problem. He says, "Basically what I reviewed were a selected set of some documents. I looked at some ads. I looked at some internal memos."

We can't tell exactly what it was because he didn't have it with him, nor has it ever been produced to us.

Then he clearly says, "No, I've never written anything or studied about fraud." Obviously, nor has anyone else. I've never---

THE COURT: I don't know about that statement. People certainly have investigated fraud cases and have studied fraud.

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MR. MOSS: Sure. People can investigate. Police do that.
THE COURT: He has no background in that at all?
MR. MOSS: None whatsoever, but the point I'm making, and I'll give you a case in a minute, even if you had a fraud investigator, someone who really had been involved in fraud, and in the case I was going to cite to you, which is the Scott case out of the Second District, Second Circuit Court---
THE COURT: You're saying that he couldn't given an opinion on the ultimate issue of whether it is or is not?
MR. MOSS: He could not.
THE COURT: He could describe what fraud is?
MR. MOSS: No, sir.
THE COURT: He could describe the mechanism of what was going on?
MR. MOSS: No.
THE COURT: I'm not saying this witness, but any witness can.
MR. MOSS: I don't think any witness can describe what a fraud is because that is also an

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ultimate determination.
THE COURT: I think maybe we misunderstood each other. An incident takes place from A to Z. I could definitively describe the mechanism of A through A. All right.
MR. MOSS: Yes, he can say and could give--clearly, I don't mean to suggest---
THE COURT: What you're saying, he could not say A through Z, therefore, it's a fraud. The jury would have to determine whether it's a fraud.
MR. MOSS: Of course.
THE COURT: That's what you're saying. I understand that. But is he qualified at this point to go through A through Z?
MR. MOSS: No, sir.
THE COURT: That's what I'm saying.
MR. MOSS: Perhaps the best way to do it, if you would allow me to voir dire him, I think we could then---
THE COURT: One more step before we do that. How is he going to testify and what is he going to say?
MR. ROSENBLATT: Okay. I've got to clear up a whole bunch of misrepresentations.

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First, Mr. Moss starts out as though it's a real negative that he got his Ph.D. three years ago. Dr. Steven Carr is young; Dr. David Carr is old. So what. He has a Ph.D. He's qualified.

THE COURT: To do what?

MR. ROSENBLATT: Okay. Absolutely zero in on the issues in this case because he is a specialist in mass media. In mass media. No one but the tobacco industry, when you look at advertising other than maybe some automobile companies--The Frank Statement, forgetting the substance of The Frank Statement, was relatively unique in the history of American advertising in that on one day every newspaper in American had that ad.

Now, they did something very similar in October, 1994 when they took out the ads about propaganda: Get the government off our backs. In one day, I believe October 25, 1994, they took a full-page ad in every newspaper, and this man is a specialist in mass media.

He teaches a course in what I consider to be the operative key word, one of the operative key words to our fraud case, propaganda. The man teaches a course in propaganda. It is our position

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that's what all these lies are, propaganda. "Don't worry about secondhand smoke, American people. If you're smoking, don't worry about your nonsmoking wife getting sick because it's okay. It's not a big deal." So he's going--obviously, that's part of his testimony. And it's a total distortion of his---

THE COURT: What is he going to say? Is he going to actually opine that they are putting out medically-faulty information?

MR. ROSENBLATT: No. That was one of the few things he was right about. He will not. He does not profess to have any medical expertise. He's not going to say, you know, it's false based on the medicine.

THE COURT: Yes.

MR. ROSENBLATT: But he's in the best position of any witness thus far.

THE COURT: To say what?

MR. ROSENBLATT: To have an appreciation of the American people's perception to their propaganda. He is going to testify that their ad campaign over the years has been incredibly effective.

THE COURT: Based upon what?

MR. ROSENBLATT: Based upon his Ph.D.

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in communications, his study of the mass media, his study of the---

THE COURT: Let's put it this way. There is on television a slew of ads, television ads. You can't go from one station to the next without seeing a particular ad or two regarding a major product, be it a car or be it a soap or be it some hygienic product. Okay. Massive exposure to the American public. How is somebody going to determine whether that's effective without doing any further research on the marketing value of it, the profit-making of it, the numbers of people who have responded to it, and all of that kind of a thing? Just merely by watching television and saying, "Wow, what a campaign," now what does that mean?

MR. ROSENBLATT: Fifty million persons smoke. They say consistently, even when their CEOs, Judge, deny that it's been scientifically proven that cigarette smoking causes cancer, they all say, "But the American people don't believe us. They believe the Surgeon General." Fifty million persons use a product that's not food, it's not shelter, it's not water, it's not clothing. It has no upside.

THE COURT: That's not enough. That's

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not going to cut it.
MR. ROSENBLATT: Help me out.
MS. ROSENBLATT: You know, I think, Your Honor, firstly, he received an enormous amount of material from the Ness Motley law firm. He's designated as an expert in the State of Florida and in another attorney general case.
MR. ROSENBLATT: He's going to testify in that case.
THE COURT: I don't care.
MS. ROSENBLATT: He teaches propaganda. I don't understand the mechanisms. I'm not a communications expert, but, for example, the way a lot of different little quotes are taken out of context and put in. This is any leading---
THE COURT: You're talking about method. That's different.
MS. ROSENBLATT: The methodology is what he's talking about.
THE COURT: If he wants to say whether it's a nice ad, a good ad a good advertising executive wants to do or an agent would want, that may be one thing, but to determine whether or not it was effective or had an effect, and he can take a look at something and say, "Gee, that's a very

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clever ad," so what?

MS. ROSENBLATT: Well, he feels and his opinion--and he teaches this, and he teaches cigarette advertising and other specific advertising in his courses prior to ever being involved and it's the reason why he was contacted as an expert, because he worked on it. For example, "Secondhand Smoke, The Myth and Reality. The use of words based upon mass media expertise." Maybe Your Honor should hear from him.

THE COURT: If it relates to that, maybe he has expertise in copyrighting and making advertising copy, if that's what you're talking about. That may be a subject he can testify about. I don't know. But as to its effectiveness on the American public and all that, without doing any specific survey---

MS. ROSENBLATT: We would like to have him. Stan can voir dire him--

THE COURT: Bring him in.

MS. ROSENBLATT: --outside the presence of the jury to explain to the Court.

THE COURT: Bring him in.

MR. MOSS: That's fine, but I think on voir dire, I would like to do the voir dire because

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that's what the rules provide.
THE COURT: You can bring him in here and find out what he is going to say, and they'll ask him questions to see what he says. I'm not satisfied at this point one way or the other that he can testify. There are certain limits to his testimony at this point and we'll find out.
MR. ROSENBLATT: There's another thing I wanted to clarify while I'm up here. In Mr. Moss's presentation, he said something on another subject; that you had told the jury to disregard the testimony of Dr. Cummings on fraud.
THE COURT: As it related to the fraud.
MR. ROSENBLATT: What you told the jury and what we discussed at side bar was that they were to disregard his use of the word fraud in a particular sentence.
THE COURT: Yes.
MR. ROSENBLATT: Okay.
THE COURT: Well, it relates to that.
MR. ROSENBLATT: No, sir. To disregard.
THE COURT: You can't talk about fraud otherwise.
MR. MOSS: That is correct. Exactly

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right. I wasn't suggesting you instructed the jury that everything he said, but we are clear it was his conclusion that it was a fraud.

MR. ROSENBLATT: I'll get the witness in a moment. Just another point I want to make. For example, Mr. Russ, in cross examining Dr. David Carr on his knowledge about secondhand smoke, asked what I consider to be a perfectly legitimate cross examination: "Well, have you done any hands-so stuff? Have you personally?" And to me, that's the subject of cross examination; that's not a basis for eliminating someone as an expert witness. He hasn't done any---

THE COURT: Yes, but I have to be satisfied that he's qualified. Okay. Let's talk to him first.

MR. WHITING: Your Honor, one point before he comes in. Again, what we have here is a supposed expert who is intendeding to testify, but there aren't any factual underpinnings for the testimony.

We just heard plaintiffs' counsel say The Frank Statement has been published in every newspaper in the United States. There is no factual testimony in this case for that proposition.

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He said in 1994 ads were run everywhere in the United States. There is no factual testimony for that proposition.

What we had yesterday was in theory testimony by Dr. Cummings about a set of ads, and then it slides to Dr. Cummings saying that has been published everywhere. It's another conduit for their hearsay creeping in, hearsay testimony from these people, when there is no factual basis in the record.

Expert testimony must not only have a basis in competence, but it has to apply to the evidence of record in the case. And that doesn't exist here and it's additional grounds why this witness should not testify.

MS. ROSENBLATT: There is testimony because I've designated it. Whether it's been considered or not, and I know it would be admissible, that it was in 400 newspapers, The Frank Statement. So I think that's in the record and that will be in the record.

THE COURT: Let's bring in the witness.

MR. MOSS: Can we bring in the witness, please?

(The witness entered the courtroom.)

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THE COURT: Swear the witness in, please.

Thereupon:

STEVEN ALAN CARR, Ph.D.

Having been first duly sworn, was examined and testified as follows:

THE COURT: We are going to have counsel ask you a few questions before we bring the jury out.

VOIR DIRE EXAMINATION

BY MR. MOSS:

Q. Doctor, my name is Ed Moss. We haven't met. You got your Ph.D. in 1994?

A. That's correct.

Q. You've never written anything regarding propaganda, have you, sir?

A. Well, I would disagree with that. I think I have written material that addresses propaganda like behavior.

Q. What have you written?

A. Well, my dissertation on the accusation of Jewish control over Hollywood addresses a systematic, deliberate attempt to mislead people.

Q. Is that the propaganda that you've written about? That's the only time, isn't it, sir?

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A. That's the propaganda that I've written about, yes.
Q. Who was it that was trying to mislead people about Hollywood and Jewish control?
A. Well, there are a variety of groups. I would say probably the best characterization would be anti-Semites and racists.
Q. Now, in doing that dissertation, Doctor, you made a complete a search as you possibly could of all the material that was out there that related in any way to that issue, didn't you?
A. That's correct, I did.
Q. You looked at everything?
A. Well, I tried to look at everything I could locate, yes.
Q. Certainly you think you had looked at everything that was available, right?
A. Yes.
Q. Now, in this case, sir, I mean, you certainly didn't rely upon someone to give you a selected set of documents and then write your dissertation, did you?
A. No. I pretty much conducted my own search of the documents, yes.
Q. Now, you've never written anything about the

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tobacco industry, have you, sir?
A. I have actually addressed issues that--an issue that was relevant to the tobacco industry.
Q. Are you talking about your dissertation on the Smothers Brothers?
A. It actually wasn't a dissertation. It was a published article in a journal.
Q. You're talking about your article on the Smothers Brothers?
A. Yes.
Q. Would you tell the Judge the extent of what you addressed about the tobacco industry? That was a less-than-one-paragraph statement in there, wasn't it, sir?
A. That's correct. I talked about it's part of the overall changing landscape of mass communication at that time in the 1960s. I talked about the ban on television advertising of cigarettes.
Q. That was it?
A. And that was it.
Q. And that's the extent of what you've ever written about tobacco?
A. That's the extent of what I've written as published. I have been working on an article that goes into more detail about the battles that took

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place at that time over---
Q. The battles on the ban on advertising?
A. Well, the battles particularly with the Attorney John Banshoff and the CBS affiliate in New York, and how, out of that battle, a number of antismoking public service announcements were aired.
Q. But that hadn't been published anywhere. It's not even done yet, has it?
A. I'm still working on it.
Q. Now, you've never taught anything--do you teach now?
A. I do teach now, yes.
Q. You've never taught anything about tobacco, tobacco companies?
A. Well, the issue has come up in my classes.
Q. That's not my question. You've never taught anything about tobacco, have you? You haven't taught any courses involving tobacco, tobacco advertising?
A. Well, I have taught in my classes about tobacco and tobacco advertising.
Q. You taught a class on tobacco advertising?
A. I didn't say I taught a class. I said in the classes that I teach I have taught about tobacco and tobacco advertising.

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Q. Okay. You've never done any study on misinformation or published anything on misinformation, have you, sir?
A. Well, I would disagree with that. The dissertation that you mentioned, or that we had talked about earlier, does address a misinformational campaign.
Q. That is the one in Hollywood?
A. Right.
Q. Or the one coming out of Hollywood.
Have you ever published any articles dealing with the subject of misinformation?
A. No. I have not published any articles on the subject of misinformation.
Q. Have you ever published anything regarding tobacco, your allegation of the tobacco industry's use of so-called propaganda?
A. I haven't published anything with regard to that. I would like to amend something in my earlier answer to say that my dissertation has been accepted for publication by Cambridge University Press.
Q. Okay. Doctor, in getting ready to testify in this case, you've done no systematic study of what the perception or opinion is of the American public with regard to tobacco and health-related

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issues, did you, sir?
A. Well, I don't really see that it is necessary. I think I've done a systematic investigation.
Q. Doctor---
MR. ROSENBLATT: Let him answer.
The COURT: Go ahead.
A. I've conducted a systematic investigation into the attempts by and the rather successful attempts by the tobacco companies in forming their cartel to wage a campaign of public disinformation. And that did not occur in a vacuum.
MR. MOSS: Read back my question, please.
(The question referred to was read by the reporter as above recorded.)
The WITNESS: My answer stands.
Q. You think that you've answered my question just now?
A. I know that I've answered your question.
MR. MOSS: Your Honor, can I ask that you have the witness answer the question?
The COURT: I can't make him answer the question if he says, "That's my answer."
Q. That's your answer?

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A. That's my answer.
Q. What have you done to study the public's perception of tobacco on health issues? Tell the Judge each step.
A. Well, let's see here. I've examined the public relations efforts that the tobacco industry engaged in that were meant for public consumption. I have looked at scores of pages of advertising also that appeared in major metropolitan dailies like New York Times, Boston Globe, Miami Herald, Wall Street Journal. I have read hundreds of pages of press releases that were sent out to various media outlets.
Q. What have you done to determine what the public's perception is on tobacco and health issues?
A. I don't need to determine that. The evidence is already there. People are smoking.
Q. Okay.
A. A successful campaign was waged to keep government from enacting regulations that would protect the health of everyone.
Q. All right. So your conclusion is that because people are out there smoking, still buying cigarettes, that based upon that fact and your looking at some documents from the tobacco company,

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that the public doesn't know anything about smoking--those that go buy cigarettes don't know anything about smoking and health issues, and smoking and health risks; is that correct?

A. The measure of success that the tobacco companies have had on influencing public opinion does rest in the fact that people, one, are still smoking, and two, that there is a fabricated, manufactured controversy over whether or not smoking causes health problems.

Q. Doctor, we do know that you have absolutely no training or expertise in issues of causation of disease, correct?

A. I mean, the evidence seems pretty clear that smoking causes health effects.

Q. I know you are Mr. Rosenblatt's communications expert. Obviously you and I don't communicate too well.

MR. MOSS: Please read the question back.

(The question referred to was read by the reporter as above recorded.)

THE WITNESS: That's such a misleading question.

Q. You'd rather not---

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A. The evidence is already there. It does not take a medical doctor to figure out that smoking causes health effects.

MR. ROSENBLATT: I rest my case.

Q. Doctor, do I take it you would rather not answer my question?

A. I did answer your question.

The COURT: If that's his answer, that's his answer.

Q. Doctor, you don't have any idea what was taught to school children in the 1950s about smoking and health, do you, sir?

A. I do have an idea about what was taught to children in the 1950s in smoking and health.

Q. So you've done some work since your deposition?

A. Not really. I think it's actually very apparent. I just look at the kind of education that children are receiving from television. Who sponsored I Love Lucy? Philip Morris.

Q. Doctor, okay. So whatever work you've done to know what--how do you know what was being taught in school on smoking and health? On deposition you told us you had done no review on that.

A. I can't imagine that people were not

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influenced by what happens or what they saw on TV, and that that didn't spill over to their educational experience.

Q. Doctor, once again, we have got this serious communication problem. Maybe I'll speak slower.

What study have you done to determine what the curriculum was in the schools around the country in the 1950s with regard to teaching students about tobacco and health related issues?

A. As far as the curriculum goes, I have not conducted any kind of study in terms of specifically what the curriculum taught. I think that's a minor point in all this.

Q. Whether it's major or minor, let me simply suggest that's what the Court's going to decide, not you or I.

Now, if I ask you the same question as to what was being taught in the schools in the 1960s and the 1970s, your answer would be the same, correct?

A. My answer would be the same, yes.

Q. Now, let's talk about what was out there in the public domain in the 1950s and 1960s regarding the hazards and alleged risks of smoking and health. You had done no review of the popular publications

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out there in the fifties and sixties to determine that. At least not at the time of your deposition you hadn't.

You haven't done any since, have you?

A. Well, I don't know that I agree with that characterization.

Q. Answer my question. Have you done such a review now?

A. I did answer your question. I don't agree with the characterization that I haven't done that.

THE COURT: I think we're getting a little off base here, counsel. I think what I really need to know is what his opinion is. When I find out what his opinion is, I'll find out what the subject matter is we are we're talking about.

BY MR. MOSS:

Q. What is your opinion here?

A. Well, my opinion is that the tobacco industry, by forming an industry-wide cartel, led a systematic deliberate attempt to knowingly market a lethal and defective product and that the magnitude of this propaganda campaign was incredibly great; that we're not just talking about any kind of communication, we're talking about mass communication, systematic, deliberate and planned

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attempt, and I think that's an important distinction to make.

THE COURT: What's that based on?

THE WITNESS: That's based on my years of expertise, teaching at a university.

THE COURT: I'm talking about the specific facts that you base this concerted plan or whatever it is you just mentioned, by the cartel as you put it.

THE WITNESS: Well, let's see.

THE COURT: Other than looking at ads and watching television and all that.

THE WITNESS: Right. Well, the basis of that, I think, rests with things like The Frank Statement, the internal documents that talked about how they're going to get their message across to the American public. And I think based on those documents like that, including as well the ads and the propaganda and the lies of the campaign, that's how I came to my opinion.

THE COURT: How do you know they're lying?

THE WITNESS: Well, I know that they're lies because, for example, I challenge at this point in time now a reputable scientist or doctor to come

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up here and say that smoking does not cause disease.
THE COURT: That's based on what?
THE WITNESS: And that's based upon my review of various documents in the course of my preparation for this testimony, it's based on my living in this culture basically.
THE COURT: Let me hear from them.
MR. MOSS: Do you want --
THE COURT: I want him to ask questions.
MR. MOSS: I'm sorry.

VOIR DIRE EXAMINATION

BY MR. ROSENBLATT:

Q. Let's talk about your thesis a little bit. You know, Mr. Moss was kind of sarcastic about it because it involved Hollywood, but is it fair to say that what attracted you to the subject was because you knew that it has been historically the contention of anti-Semites and racists and hate groups to contend that Jews controlled Hollywood in the making of movies, is that correct?

A. Correct, yes.

Q. And you got involved and you wrote your dissertation and you did research to show that that was lying propaganda, essentially, correct?

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A. That is correct.
Q. Was that your conclusion?
A. That was my conclusion, and I think there was a very strong parallel between what I argue in my dissertation and what I see going on in this trial as well.
Q. So that from the hate group standpoint, if people were complaining about movies, that there's too much sex, there's too much violence, there's too much bad language, we'll blame the Jews?
A. That's part of it, yes.
Q. Now, what does it tell you about the effectiveness, from the standpoint of your expertise in mass media and propaganda, when you assess the effectiveness of a propaganda campaign, to know that the great majority of doctors and scientists say that cigarette smoking causes lung cancer and other disease and the tobacco industry itself takes the position that the American public accepts that, yet 50 million people voluntarily go into their pocket and pay money for a product that can kill them and that is obviously not a necessary product.
So, what does that tell you from the standpoint of your specialty about the effectiveness of that campaign?

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A. Well, one of the things that I have heard here today and what I have read in testimony is that the poison is in the dose. Well --

THE COURT: Let me talk to counsel sidebar.

(Counsel and the court reporter approached the bench, and the following discussion was held:)

THE COURT: My bailiff has just informed me that this witness was sitting in the court during the testimony of Dr. David Carr. I thought about -- he just told me that and then just serendipitously he came out and said something about he thought he had heard during the day about the poison being in the dose --

MS. ROSENBLATT: But you said experts can sit. They're having their experts sit. We asked you that.

THE COURT: Okay. Well, I just --

MR. MOSS: I don't have a problem with that.

THE COURT: I just want to bring it to your attention.

MS. ROSENBLATT: They were aware and we had asked.

THE COURT: All right.

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MS. ROSENBLATT: Would you rather they not?
THE COURT: No. It never occurred to me at that point because I --
MR. COFER: Just wanted to make sure it's not an issue.
MR. ROSENBLATT: It's not an issue.
THE COURT: Then I don't worry about it.
MS. ROSENBLATT: We have enough issues to worry about it.
(The following proceedings were held in open court:)
BY MR. ROSENBLATT:
Q. Dr. Carr, let me show you Plaintiff's Exhibit Number 829 in terms of methodology and ask you to explain how this particular ad, as the one example, fits into your overall opinion about what the tobacco industry has done relative to propaganda.
A. Can I just look over this for a few minutes to refresh my mind?
Q. Sure.
MR. MOSS: Tell us what this one is.
MS. ROSENBLATT: I think it's the

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headline --

MR. MOSS: 829?

THE COURT: 829, on the bottom, 0-8.

A. Well, there are a couple things. First of all, I think in terms of the propaganda aspect of this ad, it's important to note that this ad just didn't appear in one place but appeared in many different places, many different newspapers, potentially reached millions of people.

The second thing is that, as is very typical of the kind of deceit that takes place with these ads, many things are taken out of context. So, you have, for example, the news headlines that are ripped or appear to be ripped from the paper, but you don't know where those articles have appeared. They just appear in a vacuum.

So, you see that in print or one would see that in print and oh, yes, now I see, there is doubt, whatever. So, this is, I think, being expressed with this kind of imagery.

Along similar lines, for example, the pointing out the apparent statistical error in the Japanese calculations of that study, I mean, there is no indication of how important that is. I mean, they say it's important but they're given very

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little evidence as to whether this was a minor or major flaw. It just says, oh, there's this error here, that's terrible.

Q. Let me ask you this: From the standpoint of methodology and from the standpoint of your having reviewed many tobacco ads, how would you summarize the propaganda techniques used by the tobacco industry to keep alive and to create what is essentially a non-existent scientific controversy?

MR. MOSS: Objection, Your Honor -- I'm sorry.

MR. COFER: And I'll join his objection.

MR. ROSENBLATT: Overruled.

MR. MOSS: I guess that's the definition of a reflex reaction.

MR. COFER: I want a sidebar.

MR. MOSS: Yes, we'll have a sidebar.

MR. ROSENBLATT: They're serious. If they don't have a sidebar, if ten minutes goes by without a sidebar, they start to show the effects.

A. I'm sorry. Everything that I've seen would seem to indicate that secondhand smoke does cause health effects. And with this kind of ad and others like it, it's manufacturing doubt where there isn't

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any and it's doing it by, for example, taking relatively minor details and trumpeting them and blowing them up into something that they're not.

Q. Dr. Carr, have you been listed as a witness in the State of Florida case?

A. I have been listed, yes.

Q. Have you received documents to review in connection with that case?

A. I have, yes.

Q. About how many?

A. Oh, I would say well into the hundreds.

Q. And you have received from us an index to tobacco documents consisting of 42 items, is that correct?

A. That is correct.

Q. About three months ago?

A. Yes.

Q. Do you feel, from a practical standpoint, without personally conducting a survey or without personally doing hands on research yourself, that from the standpoint of your expertise in teaching propaganda, being a Ph.D. in communications, your study of mass media, that you can reach a sound conclusion and express a sound opinion based on the public's perception of tobacco issues?

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A. Absolutely.
THE COURT: All right. If you will step outside, sir, appreciate it.
THE WITNESS: Do I give this to anyone?
THE COURT: Just give it to counsel.
(The witness exited the courtroom.)
MR. MOSS: I don't know if Your Honor wants to hear law or not.
THE COURT: I have a real problem, to be perfectly honest with you, as far as his expressing a view as to the efficacy of this campaign. I don't think he's in a position to make that statement.
I think anybody can look at the ads and determine whether or not it's an ad for the tobacco industry which espouses a particular position. I don't think we need an expert for that.
If he wants to talk about what he considered may be an effective way of presenting something vis-a-vis an ineffective way of presenting something, I suppose he's got that expertise without getting into his own personal view as to whether or not the contents of what their ad shows is, in fact, in error, because I don't think he has any basis to show that other than something he's read or he's

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familiar with from prior testimony.

So, I'm very concerned about what his testimony could be about. I think it's quite limited. I certainly don't think he can express a view as to whether or not there has been a fraud or a concerted effort by the tobacco industry to subvert the public's mind.

The public can say, well, this is an ad campaign. Lord knows the American public is deluged with ad campaigns designed to affect their thinking. We don't need an expert to tell us that, so I just don't see where he could add anything to that.

He hasn't done any expert study. He just looked at a couple things and said, gee, that's a great ad or it's not a great ad.

I'm inclined to disallow him.

MR. ROSENBLATT: You said we could go into the issue of look at the ads based on his expertise, why he considers these ads to be very effective and then, obviously, where I would go from that is does he consider them misleading.

THE COURT: How would he know? How would he know?

MR. MOSS: That's the point.

MR. ROSENBLATT: Because like he said,

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he lives in this culture and studied mass media. He knows that smoking causes adverse health effects. He looks at the ads and all the ads say it hasn't been proven.

MS. ROSENBLATT: And we could give him a hypothetical based on the testimony presented.

THE COURT: I'm not going to accept that. Any advertising giant would tell you the same thing, I suppose: "I know that smoking is bad for your health, therefore" -- that's not the issue here in a court of law. That's not what we're talking about.

We're talking about proofs. I don't see what he can add to this thing more than an average American can look at all the ads and see, gee, it has a beautiful girl, a beautiful -- smoke the cigarette because we're the best or they have got a whole bunch of papers there that rip off headlines or whatever it said, I haven't read it, and they look at it and say, okay, so --

MR. MOSS: That was the point Mr. Rosenblatt just made, although not intentionally, and this witness made, that, hey, I live in this world, I know.

This is the point. That's what a jury is

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for.

THE COURT: And if they know because he knows -- in other words, there's nothing special about his expertise which would give him the knowledge to know. That's the difference.

MS. ROSENBLATT: But he does have the knowledge about the effectiveness of successful advertising.

THE COURT: But not in this case.

MS. ROSENBLATT: This is no different.

THE COURT: And what is "successful" here? We don't know. Is it because 500,000 people smoke cigarettes, does it mean every one of them was influenced by the add?

So, I can't buy that. I don't know what you want to put him on to express, but he certainly can't express opinions on fraud, the fraudulent practices, because I don't think he has enough background for that.

So be it. Now, if you want to talk about advertising techniques, that's one thing, but I don't know how you would evaluate that.

MR. ROSENBLATT: In view of what Your Honor has said, after much thought and introspection in depth, we're not using him.

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THE COURT: All right. What is the next thing?
MR. ROSENBLATT: We have a video.
MS. ROSENBLATT: The video that we can start of Ray Morgan.
THE COURT: How long does that run?
MS. ROSENBLATT: In total it's going to run about two hours. So, we could play about an hour or whatever.
THE COURT: Let's take a break. You go talk to your witness and we'll set up.
MR. HARDY: Is that right about the length? I understood the length of this deposition was going to be between three and four hours.
THE COURT: So, we'll do a little bit today.
MS. ROSENBLATT: One hour fifty-seven, and the second tape is nineteen minutes. So, it's about two hours twenty minutes after editing.
MR. HARDY: I didn't want to end up in a situation where it would split up the testimony of a live witness tomorrow morning.
THE COURT: No. We'll finish the tape first, sure, but the jury has been sitting in there wondering what we're doing.

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Let's take a break.
(A recess was taken.)
(Discussion off the record.)
THE COURT: When you think about it, the way we make important decisions in our life, the ones that really control our lives, we gather as much information as we can, good, bad or indifferent, we gather it all and then start throwing out things we believe in and not believe in but we know about, and we make the decision based on everything we know or heard.
Juries don't have that option. Juries only hear a very minute factor. And to make an intelligent decision on that I think is wrong because they don't have enough, and there's the whole trouble with the system, basically, if you are talking about decisions that affect people's lives.
So, it is critical. But that's our little system. Okay.
This is what we went over before?
MS. ROSENBLATT: Right.
THE COURT: It's been edited.
MS. ROSENBLATT: The videotape deposition.
THE COURT: It runs about two or three

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hours.
MS. ROSENBLATT: It's two hours and fifteen minutes. That's what the videographer said.
THE COURT: I guess we're going to have to finish up tomorrow because, unfortunately, I can't stay this evening.
MR. ROSENBLATT: That's fine.
THE COURT: Bring the jury in.
MR. HARDY: Your Honor, what I'm concerned about, I understand that the direct and cross are approximately the same length of time. We're talking about in round numbers an hour each.
THE COURT: I don't mind breaking.
MR. HARDY: We would like to break it up between the two, so the cross examination is not --
THE COURT: Can we find a nice convenient spot?
MR. HARDY: Direct today and cross in the morning.
THE COURT: If it works out time-wise, I don't have any problem.
MS. ROSENBLATT: I think that would mean at Page 91 the cross starts, and then we would make sure --

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THE COURT: Well, we'll make sure we do it that way then.

MR. ROSENBLATT: So, we are only doing direct today.

THE COURT: We'll do direct today and cross tomorrow.

(The jury entered the courtroom.)

THE COURT: I know you folks have been wondering what in the world was going on in here. We wondered what in the world is going on in there. It's, unfortunately, the kind of situation which I explained to you early on in the case that we would have these sessions throughout the trial.

We have the videotape now to play for you. We have gone through a lot. In fact, all of the objections in this tape which ran initially what, three hours, four hours, whatever, and we have pared it down just as we would have had he been here in trial with a live witness with the objections and all that sort of thing. And so, we have cut it down considerably, and that's one of the things we were doing while you were in there so you understand.

What we intend to do is play the direct questioning of the witness today and pick up the cross examination tomorrow morning. So, we'll

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run -- and it runs about 90 pages of whatever it is, which is about an hour, give or take.

So, we'll start with that.

MR. ROSENBLATT: Okay. Judge, this is the video deposition of William Ray Morgan taken April 24 this year in Richmond Virginia.

(The videotaped deposition of WILLIAM RAY MORGAN was presented to the jury as follows:)

Q. "Would you state your name for the record, please?

A. It's William Ray Morgan.

Q. Can you briefly describe for us your educational background, sir?

A. I have a Bachelor of Science degree in chemistry from North Georgia College and a Ph.D. in chemistry from the University of Georgia.

Q. Can you briefly describe for us your work experience including military experience from the time you completed your education to 1992?

A. I received my Ph.D. in 1970. I was on delayed entry on active duty in the army, because I went to a military school. North Georgia College was military school, and I was commissioned in the army in 1965, when I graduated there, and I had a delay on entry to active duty.

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So, upon completion of my doctoral work, I entered the army and served from 1970 to '72 and I was stationed in Charlottesville, Virginia as a member of the United States Army's Foreign Science and Technology Center, and we were responsible for scientific and technical intelligence work.

Upon my completion of my military service, which was in March of 1972, I had obtained a position with Philip Morris, and at the end of March began work at Philip Morris as an analytical chemist in the analytical research division.

I worked in that division until 1984, and in February of 1984 I transferred to the biochemical research division and I was in that division until I was released from Philip Morris in 1992.

Q. Why did you transfer over to the biochemical research division?

A. I requested it.

Q. And why did you make that request?

A. Work that I was doing with the analytical research division with trace metal analysis in putting together my plans for the research that I wanted to do for 1984, management had decided that they did not want to pursue that area of research. They suggested that it might be more appropriate for

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that research to be done in the biochemical research division.

I contacted the manager of biochemical research, met with him. That was Jim Charles at the time. He was not interested in pursuing that research but suggested that he had an opening in the nitrosamine group, and if I would be interested in that, and I said that I would be interested and the transfer occurred shortly after.

Q. This was in 1984. Do you remember the month?

A. February.

Q. And in February of 1984, did you pretty much immediately go over to the nitrosamine group?

A. Yes.

Q. What was the nitrosamine group?

A. It was a group within the biochemical research division that were studying nitrosamines.

Q. And who were members of that group?

A. The project leader at the time was a Sue Tafur, T-a-f-u-r. And Jim Charles was the manager, and there were approximately seven or eight other members that were chemists within the group, chemists or technicians within the group.

Q. What is a nitrosamine?

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A. It's a secondary amine that has an n-o group attached to nitrogen in the amine.

Q. And when you say n-o group attached to the nitrogen in the amine, what are you referring to?

What does the n-o group mean?

A. It's a nitrogen oxide group and it's bonded -- there's a nitrogen nitrogen bond between the amine and the n-o group.

Q. And do you know how these nitrosamines are formed in cigarette or tobacco smoke?

A. The chemistry of how they're formed or the -- they're formed in two ways. In the growing of tobacco, nitrosamines are formed during either the growing and the curing process, and these are referred to or we refer to them as endogenous nitrosamines. And those were what we refer to as tobacco-specific nitrosamines because they're alkaloid -- their origin for the organic group were the alkaloids that were in tobacco.

During the smoking of tobacco, there are additional nitrosamines of the same type, really three major ones: NNN, NAT and NNK. Those three -- there's additional quantities that are formed during the actual combustion of the cigarette, and we refer to those as pyrosynthetically formed.

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Q. Pyrosynthetically formed?
A. Right, because they're formed during the combustion of the cigarette.
Q. Let's start with NNN. What is that an acronym for?
A. Nitrosonornicotine.
Q. And NAT?
A. Nitrosoanatabine.
Q. And NNK?
A. Do you want the full name?
Q. Yes.
A. It's 4 -- I have to think about this. 4-(methylnitrosamino)-1-(3 pyradil)-1-butanone.
NNK is a very good word. There's not an alkaloid like nitrosonornicotine is formed from nornicotine and nitrosoanatabine is formed from anatabine, but there is not a corresponding alkaloid for NNK.
It's been reported in the literature that it is -- that precursor is formed from nicotine, but it's not a direct. If you just add nicotine to tobacco and try to increase the level of NNK, you don't observe an increase.
So, there's some intermediate processes, chemical reactions that occur to produce the

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precursor for NNK.
Q. Are you familiar with the research concerning whether nitrosamines are carcinogenic compounds?
A. I'm familiar with some literature.
Q. And what does the literature say?
A. Literature says that there's studies on mice, laboratory animals, that they're very potent carcinogens, in particular NNN and NNK.
Q. Now, NNN and NNK and NAT are all formed during the smoking of tobacco, is that correct?
A. Formed during the growing of tobacco during either the growing process and curing process and they're also formed during the burning of the cigarette, during the combustion of the cigarette.
Q. Is one more or less volatile than the other or do you know?
A. NNK is a little more volatile than the others, to the best of my recollection. I did some studies on decomposition temperatures for the biggest nitrosamines, and to the best of my recollection, NNK had the lowest decomposition temperature which would indicate that it was potentially maybe a little more volatile.
Q. Now, does the age of the smoke have anything

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to do with the level of volatility of the nitrosamines?

A. What smoke are we talking about?

Q. Sidestream smoke.

A. Does it have -- would you --

Q. Does it have any relation to the level of volatility of the sidestream smoke, the age of the sidestream smoke?

A. I don't like to use the word volatility. I would just say the amount of nitrosamine that's in the aged smoke, NNK is higher in aged smoke than it is in fresh smoke which is collected directly off a cigarette.

Q. And how do you know that?

A. I did studies.

Q. What studies did you do?

A. There was a chamber that was constructed. We refer to it as sidestream chamber. We constructed -- one was built in Richmond in the late 1980s. They had previously, and I presume still exists, one that was built in Switzerland at the research facility in Neuchatel where they studied the aging of smoke and studied a number of different parameters.

But it was noted in the studies that were

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done there that NNK levels tended to increase with time as the smoke aged. The other nitrosamines tended to stay essentially the same as they were in fresh smoke or slightly decline as the smoke aged.

Q. As far as research on sidestream smoke, did you do any other research related to sidestream smoke, tobacco smoke?

A. Other than the quantitative measurements of fresh and aged sidestream, no.

Q. Now, when this research was conducted, did you use actual cigarettes to do the research?

A. We used reference cigarettes.

Q. What is a reference cigarette?

A. There generally two kinds. There was one that was referred to as a Kentucky reference cigarette which was available to all tobacco companies to be used throughout the industry. And then we had a group at Philip Morris referred to as Semi-Works, which was a facility that they could make cigarettes to order, so to speak, and we could request and have cigarettes made of just about any configuration that we wanted them. And we would have -- if we wanted to, say, do measurements on a cigarette that was like a Marlboro, we would have them make a cigarette that was like a Marlboro but

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wasn't actually a Marlboro because it wouldn't have, say, the flavors added to it and what have you, but it would have the same paper, essentially the same blend, same filter, what have you, and we would refer to that as a reference cigarette.

Q. And when you said additives, flavorings weren't added into it, how do you know that?

A. Because we requested that they not be added.

Q. What was the reason for requesting that the flavorings and additives not be added?

A. Because if they were going to do that, then we could just get production cigarettes off the line, and we were told not to do nitrosamine studies on production cigarettes.

Q. Who told you not to do nitrosamine studies on production cigarettes?

A. Management.

Q. Do you have specific names that you can recollect?

A. No.

Q. Was it more than one person in management who said this?

A. It was -- when I came on board with the nitrosamine project, it was told to us at that point. It was already, I guess, the standing order

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for the people that were already working on the project, and it was just passed on to me that, when we did any studies, we did them on a reference cigarette and not on a production cigarette.

Q. How long had the nitrosamine research group been in existence prior to the time you were there, if you know?

A. I don't know exactly. It started, I know, probably at least a couple years prior to my joining.

Q. And did you begin doing research on nitrosamines immediately upon starting over there in February of 1984?

A. Yes, I did.

Q. And the instruction that you were given not to use production cigarettes, that was made clear to you immediately upon beginning that?

A. The first part of the work that I did was actually learning the procedures that were in place for the collection and the analysis, and in that case we were just using reference cigarettes. But then, when it was time for me to start actually designing experiments to study, I was told that we would not use production cigarettes but would use reference cigarettes.

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Q. Did you ask why?
A. No.
Q. The research that was done on non-production cigarettes, was that -- how was that done? By that, I mean, I should explain further, what was the procedure for putting together all the research and for keeping track of the research, for keeping notations on the research?
A. As far as notations on the research, any work we did, it was recorded in our laboratory notebook.

As far as the cigarettes themselves and the design of experiments, a lot of the experiments we did, we did not have production cigarettes that matched the parameters we needed to measure. If we wanted to, say, study construction parameters, we would make cigarettes with varying types of filters or varying types of paper or varying circumferences or various types of fillers, maybe a single type like a burley rather than the blend.

So, those types of cigarettes were not production cigarettes, so we had to have them made separate.
Q. So, was that kind of research done for the purpose -- let me put it another way. What was the

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purpose of that type of research, if you know?
A. To understand the basis of the origin of nitrosamines, to see how burley differed from bright, differed from aureal (phonetic), say, to see how, if the combustion parameters, if there was a change in, say, the relationship to the circumference of the cigarette with the packing density of the filler or the type of paper that was on it, if it had an impact on it, there were a lot of parameters that you have cigarettes made to address the particular parameter you were looking for.
Q. Aside from measuring those type of parameters for that purpose, were there any other purposes to doing the research that the nitrosamine research group did?
A. We monitored the literature, and if information was reported, say, with reference to a different analysis procedure or whatever, we would duplicate that procedure to see if it gave the same results that the procedure that we were using for an analysis.
We also were studying -- trying to get a better knowledge of, especially with the pyrosynthetically-produced nitrosamines, how they

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were produced and were there ways to prevent that formation.

We also looked at the correlations for the formation of the endogenous nitrosamines as to what parameters might contribute to their formation and also to ways that we might treat or process the tobacco to lower those levels.

Q. During the course of the research, did the group or you or anyone in the group ever measure the nitrosamine level, just measure the amount of nitrosamine in a given cigarette, whether it be non-production or production?

A. Could you repeat that?

Q. Did anyone in the group, in your group, ever measure the nitrosamine level in either a non-production cigarette or a production cigarette?

A. We did it all the time.

Q. Why did you do that?

A. Why did we monitor the level of nitrosamine? That was the objective of the project was to study the level of nitrosamine.

Q. Okay. When you studied the levels of nitrosamine in, for example, a non-production cigarette that was like a Marlboro, from a scientific standpoint, was that the best way to

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study the nitrosamine level of a Marlboro itself?
A. No. It would be a way of studying levels that existed in smoke, whether it be mainstream or sidestream for that particular construction parameter being a blend that was similar to Marlboro, the type of paper, type of filter, et cetera.
We would also have a reference cigarette or one made in Semi-Works that would be similar to, say, a Virginia Slims or maybe one that was similar to a Cambridge that had a very high filtration or different type of dilution in the paper.
Q. When you, for example, would do a cigarette, look at a cigarette that was like a Marlboro, did you actually get nitrosamine level readings on cigarettes that were supposed to be like Marlboro but not actually Marlboros?
A. I don't know because we don't know Marlboro. I don't know what their levels were.
Q. Let me rephrase. Did you ever test a cigarette that was considered to be like a Marlboro?
A. We studied cigarettes that had essentially the same blend, paper, filter, delivered the same TPM level, nicotine, as close to a Marlboro as possible. And the only difference, essentially,

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would be that it didn't have the flavor components added.

Q. And what was your understanding of the purpose of measuring the nitrosamine level in a cigarette that was like a Marlboro?

A. It was just one of the many types of configurations that we studied. When you say like a Marlboro, I mean, that's -- Marlboro is the best-selling cigarette in the world. And other cigarettes that R.J. Reynolds makes and other companies all had similar cigarettes that were similar to a Marlboro as far as delivery of tar and nicotine.

And I would guess that if you take those cigarettes from all the companies and put them together, they constitute the majority of all the cigarettes that are sold. And so, studying a cigarette that was similar in configuration to that cigarette would be something that would be most like what you would generally encounter in the world.

Q. When did you first begin doing or participating in the research that would do nitrosamine level measurements of cigarettes like Marlboro or like Cambridge or like Virginia Slims or any of the other brands?

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A. Almost immediately when I joined the nitrosamine group.
Q. And --
A. So, you have a Kentucky reference cigarette that was a filtered cigarette. It was essentially like a Marlboro.
Q. What was missing from it?
A. It might have a slightly different paper. It might have -- wouldn't have any flavor additives. But it would produce essentially the same filtration efficiency and the same TPM and nicotine delivery as the Marlboro or Winston and it would be in that ballpark.
These cigarettes we use, especially the Kentucky reference cigarettes, were used industry-wide and they were used by, I guess, just about every research project we have done within Philip Morris and, I presume, other companies, for studying a whole host of different types of studies going on.
Q. Did you ever have occasion to actually test a production cigarette?
A. Yes.
Q. How did that happen?
A. It was in the sidestream chamber in the

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aging of sidestream smoke. We had initially set the chamber up so the smoking machine would use a reference cigarette that was similar to Marlboro and there would have been a request by someone, I don't know who, to run a cigarette that was longer and slimmer. They represented there was a Kent or Virginia slim, and there needed to be modifications to the smoking machine because it was remote controlled and the inserts in the smoking machine that actually held the cigarette needed to be changed and also the remote -- the loading parameters where the cigarette was actually loaded and lit, those mechanical changes had to be made to the smoking machine. And in making and running those tests to set up to do the experiments, we were still collecting information when runs were made to develop the database for nitrosamines in environmental tobacco smoke or aged sidestream smoke, I guess as we refer to it, and we knew that run was being made, that they were going to run a different cigarette other than the ones we had been running, and nitrosamines were collected and they were given to me for analysis.

I didn't know what the cigarette was at the time that I did the analysis.

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Q. When you did the analysis, what result did you find?
A. I found a very high level of NNK in the aged sidestream.
Q. NNK being a nitrosamine that's more volatile than the others, is that correct?
A. Well, I hate to use the word volatile, but yes.
Q. What word would you use instead?
A. Volatility generally to me refers to -- it's distillation into a gas phase. I would prefer just to use the word transfer, that was transferred from tobacco into the smoke stream rather than -- I wouldn't like to say it was volatility that caused that. It could be, because of the pyrosynthetic production, it could be a reaction process that produced the higher level in that.
Q. And how much higher was the nitrosamine level in the Virginia Slim cigarette?
A. It was approximately ten times higher than we had measured with prior reference cigarettes.
Q. And when you say ten times higher, can you quantify that?
A. The NNK -- I'm referring now to NNK. I don't like to speak of nitrosamines as a group, but

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relatively prefer to speak of the individual nitrosamine.

NNK in, say, mainstream smoke would be approximately 75 to 100 nanograms per cigarette. In fresh sidestream smoke that's collected just immediately right off the cigarette, it would increase to approximately 200 to 400, depending on what your blend was. So, it averaged approximately about 300 nanograms per cigarette.

When you aged in the chamber from the aged smoke, it would go up. The NNK would increase to approximately 1200 to 1500 nanograms per cigarette. And what we measured in this particular -- on this particular run I was getting approximately 12,000 nanograms per cigarette.

Q. And when you say aged, how much age is added?

A. We would do the smoking which would take about ten minutes, then a fan would be turned on in the room to blend and get a uniform distribution of smoke in the room which would take probably a couple minutes, and then collection procedures would start and we would collect for an hour.

So, at most it was, say, an hour and twelve, fifteen minutes. So, we collected over that whole

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hour, so some of it was collected when it was only maybe fifteen minutes and some of it was collected when it was an hour and fifteen minutes.

Q. So, when you saw this level of 12,000 nanograms, what, if anything, did you do?

A. I was very surprised to see it, and I compiled the data that I had recorded from the integrators and the detectors and I took the data and showed it to my section leader, Robin Kinser.

Q. And what, if anything, did Robin Kinser do?

A. She asked me what cigarette it was.

Q. And what did you tell her?

A. I told her I did not know. I only had a code, the run code from the chamber.

Q. And did you provide her with the code, the run code?

A. It was written on the notes, yes.

Q. And after you told her that, what, if anything, did you do?

A. She --

Q. Who is she?

A. Robin called Roger Comes, who was in charge of the chamber, and inquired as to what cigarette that was for that run. And I was -- I was sitting there and after she finished talking to him, she

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told me it was a Virginia Slims.
MR. FOWLER: I'm going to object to the last part of that answer as without foundation.
Q. Robin -- who told you it was a Virginia Slims?
A. Robin Kinser.
Q. And who was Robin?
A. She was a section leader.
Q. She was your supervisor?
A. One of them, yes. I had a project leader and then there was a section leader, which she was, which was kind of like an assistant manager.
Q. She was a manager for Philip Morris?
A. Like an assistant manager, yes.
Q. And she told you it was a Virginia Slims?
A. She told me that's what Roger told her it was.
MR. FOWLER: Same objection.
Q. And who is Roger?
A. He was the person who was in charge of the operation of the aging chamber in coordinating all of the experiments that were done in the chamber.
Q. And was he a management level employee of Philip Morris?
A. I think you would refer to him as a project

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leader, so that was, yes, I guess, a low level management position.

Q. He supervised other people at Philip Morris?

A. Yes, he did.

Q. And after it was discovered that this was a Virginia Slims cigarette, what, if anything, happened?

MR. FOWLER: Object to the form of the question.

A. She said that she needed to discuss that with the manager of Biochemical Research, which was Cathy Ellis.

Q. Spelled C-a-t-h-y?

A. C-a.

Q. Cathy Ellis.

And did she discuss this with Cathy Ellis?

A. She called her on the phone, asked that she see her. And she left the office and told me that that's where she was going.

Q. And who told you that's where she was going?

A. She -- - Robin Kinser told me she was going to talk to Cathy.

Q. And then what happened, as far as you know?

A. When she left, I presumed she went and talked to Cathy. I went back to my office, my desk.

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Q. And did anyone communicate with you further about this finding of yours?
A. Yes.
Q. Who?
A. Robin.
Q. And when did she do that?
A. She came back, to the best of my recollection, about a half an hour later, and told me that Cathy had said to destroy the data and that in the future, we were not to run -- reminded me that we were not to run nitrosamines on production cigarettes, and also told me that she was going to remind Roger Comes that if he was going to run production cigarettes in the sidestream chamber that he was not to collect nitrosamines.
Q. If he was going to run sidestream smoke on production cigarettes, he wasn't supposed to collect nitrosamine levels?
A. That's correct.
Q. And then do you know whether or not this was communicated to Roger Comes?
A. I presume it was.
Q. Do you know whether anyone after that ever collected nitrosamine levels on a production cigarette?

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A. Not to my knowledge.
Q. Did you?
A. Not to my knowledge.
Q. Did anyone else in your presence do that?
A. Not that I'm aware of.
Q. From a scientific standpoint based on your experience as a scientist, does it make any sense to destroy that data that showed the Virginia Slims cigarette had ten times the nitrosamine level of any of the non-production cigarettes?
MR. FOWLER: Object to the form of the question.
A. From a scientific standpoint? No.
Q. I'm asking you, why, as a scientist, it doesn't make sense to you that that information would be destroyed?
A. No, it doesn't make -- it doesn't make sense to me why it was destroyed, no.
Q. And as a scientist, what's the reason it doesn't make sense to you?
A. By the fact that the level was so much different from what we had been getting, it was of scientific interest to me to understand why and to study what was -- what was the cause of this increased level.

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Q. Once you knew that the nitrosamine level on a production cigarette was ten times higher than on any non-production cigarette, did you have an opinion regarding whether or not the data collected on the non-production cigarettes was useful data -- the data on nitrosamine level collected on the non-production cigarettes was useful data?

A. I think it was very useful data.

Q. In what way was it useful?

A. It was useful in understanding how nitrosamines were formed.

Q. Was it useful data in understanding the effect of nitrosamines on production cigarettes or the impact of nitrosamines on production cigarettes?

A. Information that would be obtained on a non-production cigarette I don't think would have any impact on understanding the production nitrosamines on a production cigarette, because they're completely different cigarettes.

Q. Do you know whether the information collected on the nitrosamine level of non-production cigarettes was ever used to imply in any way that it was equivalent to an actual test on a production cigarette?

A. Since we didn't have information on

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production cigarettes, I think the general assumption was that it was representative of what you -- one would expect to obtain on a production cigarette.

Q. And once you had done the test on the Virginia Slims cigarette, did that change in any way the assumption?

A. It did in my mind.

Q. Do you know whether you were the only one of the scientists who were involved in the project who were of the opinion that that assumption now was questionable?

A. I have no basis that -- I would assume that other people being scientists could draw the same type of conclusion, but it wasn't discussed that I recall.

Q. And when you were ordered to destroy the data on the Virginia Slims cigarette, what did you do?

A. Took the chromatograms and the paper where I had tabulated or summarized the results and shredded it.

Q. Was there a shredder available?

A. Yes.

Q. Where were the shredders located?

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A. There was a shredder -- the nitrosamine project was on the sixth floor of the research tower. There was a shredder on that floor. There was a shredder, to the best of my knowledge, on essentially every floor and on every -- in all of the buildings throughout research and development. A shredder was used fairly -- quite frequently.

Q. What type of data was usually shredded, if you know?

A. Generally drafts of reports or memos. Say, if you made a first draft and then it was changed or added to, you would -- rather than just throw the first draft in the trash can, it would be shredded so the information or the document would not go out in the trash and be subject to being picked up by someone who didn't have a need to know.

Q. Did you ever again" --

(Video presentation was interrupted.)

MR. RANDLES: Your Honor, may we approach?

(Video presentation resumed as follows:)

Q. -- "test an actual production cigarette or cigarette you could just go and buy in a grocery store?

A. For nitrosamines?

Q. Right.

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A. Not to my" --
(Video presentation was stopped.)
(Counsel and the court reporter approached the bench, and the following discussion was held outside the hearing of the jury:)
MR. RANDLES: Your Honor, I --
MS. ROSENBLATT: This is the page.
THE COURT: Yes.
MR. RANDLES: Your Honor, I was worried about this when I heard about the length of tape. This was the first portion of my --
THE COURT: Keep your voice down.
MR. RANDLES: I'm sorry. This is the first portion of my cross-designation. It's not in there. It's skipped.
MS. ROSENBLATT: You wrote "omit" on that. This is yours --
MR. RANDLES: No. That's my cross-designation.
MS. ROSENBLATT: You said out. This is marked for out.
MR. RANDLES: I showed you my letter. It's my cross-designation.
MS. ROSENBLATT: Did you mark it on the --

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THE COURT: Where is the marking?
MR. RANDLES: I didn't put any --
MS. ROSENBLATT: How did you mark it in the transcript when you cross-designated?
MR. RANDLES: That I gave you?
MS. ROSENBLATT: Yes.
MR. RANDLES: I didn't mark it. I told you -- I told you the cross-designations were on my letter. That's why I was worried about the time of the tape. It's too short.
MS. ROSENBLATT: You know what happened, Your Honor, apparently in each of the prior depositions, when there was a cross-designation -- in each of the other depositions when there was a cross-designation, they marked it. They apparently didn't mark it here. This may come up again, from what he's telling me.
THE COURT: Lines 1 through 5. It's cross-referenced.
MR. RANDLES: Page 9.
MS. ROSENBLATT: I didn't give this to the videographer. I said I had no objection to any of the cross-designations.
THE COURT: Cross-designations, Lines 6 through 21.

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MR. RANDLES: I told you no, and because I heard last time that happened and there was confusion over that, so I gave it to you.

THE COURT: I think it's appropriate to read it to the jury, if it's not on the tape.

MS. ROSENBLATT: Well, the problem is it's going to come up --

MR. RANDLES: It's going to come up again.

THE COURT: How many cross-designations do you have?

MR. RANDLES: Well, there's a Lot of them, but between --

MS. ROSENBLATT: Why didn't you mark them here?

MR. RANDLES: I was told by the people doing the highlighting the last time we marked the cross-designation, the whole thing was marked. That was confusing.

MS. ROSENBLATT: No. I just wouldn't dream of getting anything more of this. That was all marked.

MR. RANDLES: If that's the case, they don't have my cross-designations.

THE COURT: There is not much we can do

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about it now unless you have the original tape as it was edited.

MS. ROSENBLATT: We have the original tapes, but it has all of the stuff that was edited out.

MR. RANDLES: Yes. It needs to go back in.

MS. ROSENBLATT: I know.

THE COURT: That's a little difficult.

MR. RANDLES: Yes. I would suggest we stop, Your Honor, have these tapes re-edited tonight from here on and get the cross-designations in.

MS. ROSENBLATT: Actually, coming up, there's nothing excluded.

MR. RANDLES: We have more cross-designations between here and Page 91.

THE COURT: One second.

Where is it? You said 97.

MR. RANDLES: 91 is where it starts, Your Honor.

MS. ROSENBLATT: We're on 47.

THE COURT: Okay. Cross starts on 91. In between 27, there's cross-designations on 53, 54, 55 and 56.

MS. ROSENBLATT: Apparently it's 47,

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48, as well.

THE COURT: Before we get to that -- okay. Oh, boy. Okay. I'll tell you what we'll do. Mark them all. I'll find out where they are. We can do that in the morning, I guess. Not much I can do about it.

MS. ROSENBLATT: It's 4:30 already. I can call the videographer and have them come right over.

THE COURT: Do you have the original tape?

MS. ROSENBLATT: I have the original tapes. What you need to do is with --

MR. RANDLES: Here is my list of cross-designations.

MS. ROSENBLATT: I didn't get this. I marked it all in here. I didn't dream of --

THE COURT: It got fouled up, but we can straighten it out. You can get the videographer within a reasonable time. He didn't chop the original one up?

MS. ROSENBLATT: Right. The original is here. He gave me back the original.

THE COURT: He can do the cross-designations over again.

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MS. ROSENBLATT: Yes, starting with 47.
MR. RANDLES: Sorry for the confusion.
(The following proceedings were held within the hearing of the jury:)
THE COURT: Okay. We're going to have to break at this time. Didn't get a chance to do what we wanted to complete, but we'll pick it up tomorrow morning. Like everything else in life.
We do have your checks. At least we'll get that accomplished today.
9:00 o'clock tomorrow, as usual. 9:00 o'clock tomorrow. We'll try to get through this.
(The jury exited the courtroom.)
THE COURT: Now, where are we? Let me take a look and see. I'm going to look at the cross-references, which starts on Page 9 of his presentation here.
Looking at cross-designations on the Morgan deposition, just so we know what we're doing.
MS. ROSENBLATT: I don't have that here.
THE COURT: Well, I'll read it to you.
MS. ROSENBLATT: If I get a copy of it. He has a copy.
THE COURT: I'll read it to you. Look

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at your tape -- I mean, at your transcript.

MS. ROSENBLATT: Right. I think what I'll do, since there's so many markings here, I'll just give them the actual cross-designations. They're pretty good about going through each. They'll go to the page and the lines. I just didn't realize I had to go to two documents.

THE COURT: Let me just see how it works out on Page 53, for example.

Let's see. Page 53, Line 5 through 8 and lines 11 through 16. It really isn't that much.

54, Lines 18 through 22. And Line 25, Page 55. So they want to do the whole page of Page 55. We'll have to look at that. Page 56, they designate Lines 1 through 14.

MR. RANDLES: Your Honor, just so we're clear --

THE COURT: We get up to Page 91.

MR. RANDLES: There's not that much, but it's important in context. And then we have the cross.

THE COURT: Well, I have no problem with getting this done this way. You're entitled to it.

MR. RANDLES: I think we can get it

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done tonight.
THE COURT: It's really not that much, but we can't do it immediately. We have to do it overnight.
Now, when you get into your cross-examination, you have a whole bunch of cross-designations.
MR. RANDLES: Yes.
THE COURT: What does that mean? Does that mean we don't have those in the tape either?
MR. RANDLES: I don't know. That was my concern.
MS. ROSENBLATT: If it's not marked in the transcript -- I did not give him -- I marked carefully, crossed things out.
THE COURT: Why don't you hang out and just pick out one. Page 108. I'm just going to do this at random and see how it turns out. On Page 108, Line 1 through 25, it's the whole page.
MS. ROSENBLATT: These are out. I have a clip here, and it says out because there was nothing marked.
MR. RANDLES: Yes. Again, we miscommunicated. I apologize to the extent that it's my responsibility. I mentioned to Susan I

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didn't mark the transcript, but I didn't think --
MS. ROSENBLATT: It didn't register.
MR. RANDLES: We didn't have a meeting of the minds. We can correct it. I think it will be longer.
MS. ROSENBLATT: It will be longer. We do have a bit of a problem. The videographer -- it's not a big problem. The videographer is working on Spears. There's no way this will be completed because he worked until 2 a.m. in the morning.
We'd like to put on -- I know defense counsel wanted to go through this completely. Dr. Steinfeld, when this is completed, he should be completed, because I don't think we'll have it done first thing in the morning.
THE COURT: What are you talking about?
MS. ROSENBLATT: In other words --
MR. ROSENBLATT: In other words, tomorrow --
MS. ROSENBLATT: We won't have this by 9:00 a.m. done.
MR. HARDY: The reason you won't is the videographer is working on Spears. The thing is, have the videographer stop working on Dr. Spears and re-edit this so this is not interrupted and can be

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played in the morning. Then he can do Dr. Spears.
MS. ROSENBLATT: We have to play -- why don't you take care of this one to get it done overnight.
MR. RANDLES: That's fine.
MR. HARDY: That's fair.
MS. ROSENBLATT: I don't think there's one person there.
THE COURT: If you can handle that.
MR. HARDY: We'll do Morgan so it can be continued in the morning. That's fair.
THE COURT: I wanted to make sure in these cross-designations that you mentioned -- I thought we went over the whole tape -- I mean, the whole transcript, and they adjusted it.
MR. RANDLES: We talked about it last night, and I thought that was reflected in this. There was a miscommunication about it.
THE COURT: You agreed on it.
MR. RANDLES: Exactly. It was just a problem of getting from us to the videographer, I think. We'll go get this done.
THE COURT: All right.
MR. ROSENBLATT: You know, Judge, from our standpoint, I understand that's ideal if you

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could continue it, but it's being broken up overnight anyway, and we have a live witness in the morning that has to leave. If we play this first, he'll probably go over the lunch hour.

MS. ROSENBLATT: He has health problems, and he needs to get back.

MR. ROSENBLATT: It will mess him up. I think we should accommodate the live witness.

THE COURT: He's here live?

MR. ROSENBLATT: Yes. He's from [DELETED].

MS. ROSENBLATT: He has a spinal problem.

THE COURT: If it's a medical problem and it's an inconvenience --

MR. ROSENBLATT: I'll talk to him. If he doesn't care, that's fine with me.

THE COURT: Maybe he can sleep late.

MR. ROSENBLATT: Hmm?

THE COURT: Maybe he can sleep in late. Probably wouldn't mind that.

MR. ROSENBLATT: I think there's a flight.

THE COURT: He's here now?

MR. ROSENBLATT: Oh, yes. He's here.

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MS. ROSENBLATT: He came in.
THE COURT: Why don't you ask him and see how it works out. Meanwhile, we'll still work on this.
MR. ROSENBLATT: Okay.
THE COURT: All right. So we'll see you tomorrow.
(Court was adjourned at 4:35 p.m.)

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